

TRANSITIONAL JUSTICE (TJ) MECHANISMS IN NEPAL: VICTIMS' NEEDS AND
STATE RESPONSES

by
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THESIS ABSTRACT

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Title: Transitional Justice (TJ) Mechanisms in Nepal: Victims' Needs and State Responses

This thesis examines the history and intricacies of Transitional Justice (TJ) and how it has been utilized in the case of Nepal. Since the TJ process does not exist in a historical and socio-political vacuum, I also cursorily review facets as they pertain to the TJ process in Nepal. The rallying cry among victims and families of civil war victims has been for inclusivity in the TJ process and its implementation, holding offenders accountable, and appropriate restitution and reconciliation opportunities. This thesis evaluates the current TJ mechanisms implemented in Nepal and analyzes their efficacy in fulfilling the needs of the victims. The TJ process, even before any implementation and definitely during the consulting period, should be more victim-centric; this allows for the goals of TJ to be met at an immediate individual level, which in turn could lead to an onset of a larger positive socio-political transformation. I also argue that the utilization of Restorative Justice (RJ) principles using Participatory Methodologies will contribute towards ensuring both TJ processes and frameworks focus on the victims' needs.

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Dedicated to victims and survivors of violence and injustice.

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CHAPTER I

INTRODUCTION - “Justice delayed is justice denied”

Between early September of 2016 and 2019, more than 200 news articles were published in just a handful of Nepal’s major English dailies with the term “Transitional Justice (TJ)” (Nepal Research, 2019). In addition to continuous press briefings the issue of TJ in Nepal has been a constant source of much academic and practice-based research, local and national programs, bi-lateral and multi-lateral aid, and countless workshops and even protests. Yet, there is still a misconception of what exactly TJ is and whom it aims to benefit. Similarly, the role of TJ in benefitting the victims and contributing towards a positive societal transformation has not been fully acknowledged. Therefore, it is important to analyze why steps taken by the Nepali government have not fully addressed victims’ needs as the TJ process still continues even a decade after the end of the civil war. In addition, there is an immediate need to find ways where the TJ process and mechanisms can address victims’ grievances and needs.

Nepal has yet to address, let alone heal, the societal wounds left behind by the decade-long civil war from 1996-2006 that took the lives of more than 17,000 people, with another 1,700 victims of enforced disappearance. Incidences of violence were carried out by both the sides of Security Forces of the Nepali Government, and the Communist Party of Nepal-Maoists (CPN-M)¹. Figure 1 shows the number of “incidents” that occurred during the civil war with the two sides as alleged perpetrators.

¹ I interchangeably use Maoists and CPN-M

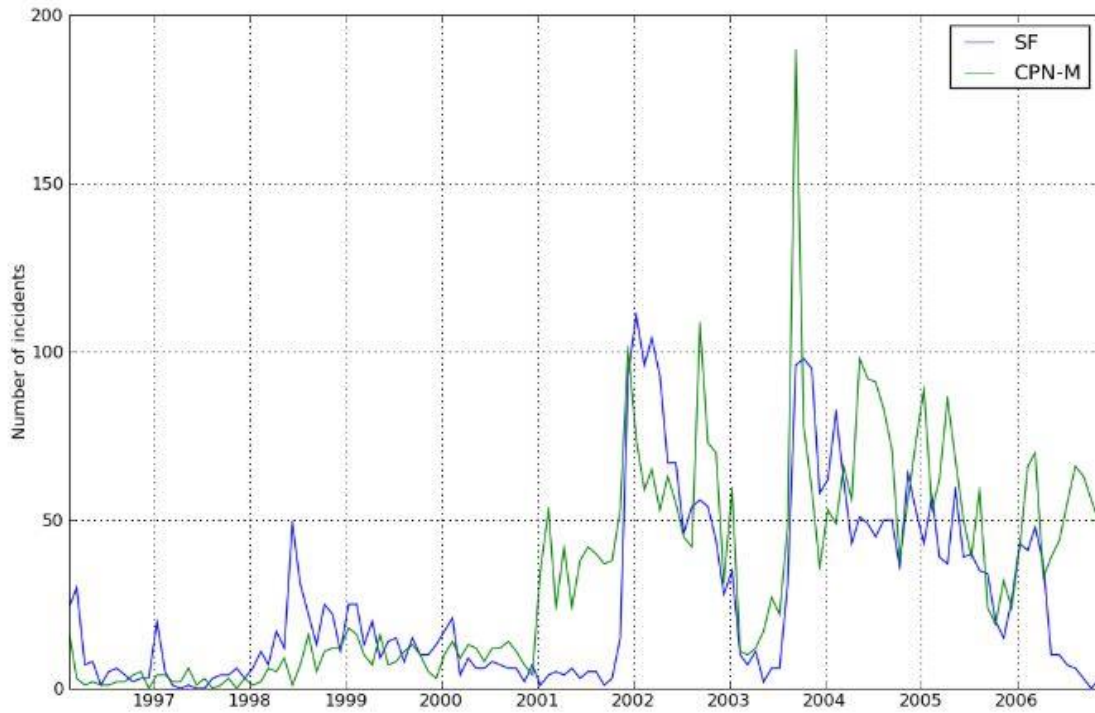


Figure 1: Number of Incidents Perpetrated by Security Forces (SF) and Maoists (CPN-M). (OHCHR, 2012, p. 35)

The end of the war in 2006 brought about not only an end to systemic direct violence but also heralded an era of “New Nepal” aimed at rectifying the social injustices of the past (Hangen, 2007). The ceasefire between the government and the then-Maoist rebels resulted in the signing of the Comprehensive Peace Accord (CPA) in 2006, eventually leading to the ousting of the monarchy and the establishment of a Federal Democratic Republic.

However, the initial jubilation that had greeted the nation stagnated quickly in a political quagmire, and the grandiose promises made to the populace, both in speeches and political agreements, have yet to be fulfilled. The peace² brought about by the CPA was not enough to address the underlying causes of conflict and instead created more groups that remained dissatisfied post-civil war. Conflict victims struggle to find truth, reconciliation, reparations, and justice.³ The sustainability of the current peace seems to be in jeopardy because of the lack of positive and tangible action in addressing their needs through the established Transitional Justice (TJ) mechanisms.



Figure 2: Nepal map by NordNordWest, Licence: Creative Commons by-sa-3.0 de⁴

² I contest that peace here is defined only as the absence of violence and seen as a “negative peace” rather than a “positive peace.” The fear of being in a crossfire, succumbing to a homemade (pressure cooker) bomb, or just caught between two warring factions with the threat of being disappeared and/or killed is not present. However, there are still, in addition to structural violence, extensive “cultural violence” based mainly upon religion, ideology, and language in the case of Nepal (Galtung, 1990). This is primarily seen in the Terai/Madhesh (lowland regions), and there has been an uptake in physical violence and extra-judicial killings based upon those three facets in addition to the connection of geography and economic stature. I discuss more of this and how it also relates to the current TJ issue in Chapter Six.

³ Reparations can take multiple forms depending on the victims’ needs and wants. Reparations should not be conflated with only monetary compensation.

⁴ For a more detailed provincial map of Nepal see Appendix A

The pace of development, in general, has always been a slow affair in Nepal. A recent news article by Phuyal (2019) highlights the plight of the Melamchi Water Project, which promised to provide an abundance of drinking water to Kathmandu Valley and the capital. Yet taps at home remain obsolete. The project was envisioned in 1991 and slated to be completed within five years. However, the project did not begin until nine years later in 2000. Since then, with 17 government reshuffles, administrative incompetence, and unprosecuted corruption of multiple of low- and high-level officials, the promises from politicians to get the water running is as dry as the taps itself. The dearth of clean drinking water is just one of the many basic human rights issues in Nepal that have yet to be addressed, as is the plight of post-civil war victims and their families. While the denizens of Kathmandu Valley, and in some respect the country, have unfortunately acquiesced to the seemingly apathetic and sluggish Nepali bureaucracy, individuals and groups championing TJ must not. There is an immediate need, without any alternatives, to find out the details and truth about the ‘missing’ for their families to be able to move forward and receive crucial support. Equally other conflict victims and their families should receive appropriate and necessary support from the government. They should not be made to languish in the slow wheel of political indifference, or even deliberate sabotage of the TJ process, to be forgotten and denied their human rights and the state’s obligations to them. There also needs to be accountability of actions purported during the civil war and means to receive closure from the wounds of the war.

This thesis examines the history and intricacies of Transitional Justice (TJ) and how it has been utilized in the case of Nepal. Since the TJ process does not exist in a historical and socio-political vacuum, I also cursorily review facets as they pertain to the

TJ process in Nepal. The bitter truth is that the period from the end of the civil war to now is very soon going to be longer than the period of conflict itself, and yet the TJ process is nowhere close to implementing adequate measures to help those affected by the war or get answers to the whereabouts of those who were disappeared. The rallying cry among victims and families of civil war victims has been for inclusivity in the TJ process and its implementation, holding offenders accountable, and appropriate restitution and reconciliation opportunities. This thesis evaluates the current TJ mechanisms implemented in Nepal and analyzes their efficacy in fulfilling the needs of the victims. I hypothesize that the TJ process, even before any implementation and definitely during the consulting period, needs to be more victim-centric. This would allow for the goals of TJ to be met at an immediate individual level, which in turn could lead to onset of a larger positive socio-political transformation. I also argue that the utilization of Restorative Justice (RJ) principles using Participatory Methodologies will contribute towards ensuring the need of both TJ processes and frameworks to be victim-centric as per the victims' needs.

CHAPTER II

METHODOLOGY

As a Nepali citizen who grew up in the capital during the civil war, the conflict did not seem to be anything out of the ordinary. There were occasional bomb scares, *bandhs* or shutdown of the whole country as means of political protests, and somber news reports about the successful retaliation against the “terrorists.” As long as a person was in the capital, the risk of violence was minimal, especially to an eighth grader. However, the year 2001 was horrid, not just for Nepal, but also for me when I suddenly began to realize that life as I had known it was not as normal as I had thought.⁵

The gravity of what had occurred over those years became starker much later when I planned to write my Master’s thesis on Transitional Justice, specifically focusing on cases of Enforced Disappearances. My friends and family had not quite heard of the term Transitional Justice even though they did know the issues plaguing post-conflict Nepal. As a Conflict Resolution and International Studies student, I felt prepared to complete a participatory study. However, I soon realized that even though I might have been prepared academically, I was completely unaware of the impact people’s stories would have on me not just as a researcher but as a fellow Nepali. I felt out of place and in a short span of time started mirroring their helplessness.

I had failed to realize that there was no dearth of Master’s and PhD students wanting to meet the same groups and people as I did, and ask eerily similar questions.

⁵ The Royal Massacre occurred in 2001 and completely changed the trajectory of the conflict and could be observed at that time. Also, the 9/11 attacks that year changed the global landscape in multiple ways and the “fight against terror” was felt in Nepal as well with the government receiving more assistance from the global community. See Chapter Four of this thesis.

Even though the TJ mechanisms had recently been put in place, some family members had been living with their experience since 1996 with almost nothing to show for their constant pleas, protests and persistence. I did not feel prepared for the experience of “interviewing” someone who might have to live with trauma and a constant mix of uncertainty, fear, hope, and sadness. I concluded that I would not be able to do my research, but I still visited forums, talked to interested individuals, and also attended the memorialization and theater program organized in Kathmandu during the annual International Day of the Disappeared on 30 August 2016. There were some meetings I attended where I was labelled as a “parasite” and my intentions were falsely assumed to be just self-serving. Victims’ families had been attending these ‘meetings’ without getting anything in return, at least not what they actually needed and wanted: answers they had been searching for in order to transcend the constant trauma. In a situation where there is much helplessness to be felt, the least I can do is raise awareness and share the victims’ stories that they have already told countless times. I hope that there will be more people on their side when they venture out yet again to get answers and the resolution/ reconciliation that they need.

Given that there exists a multitude of literature on Transitional Justice, I am using Nepal’s context as a case study, and I critically appraise multi-disciplinary literature on the issue. Using causal analysis, I analyze the effects of the implementation of TJ mechanisms in Nepal. I have aggregated the cavalcade of news that flows on the topic and placed it within the context of interdisciplinary peer-reviewed articles and books. As part of “prescriptive policy literature” (Shneiderman et al., 2016, p. 2069), I evaluate if the current TJ mechanisms in Nepal are sufficient to address the needs of victims and

survivors of the civil war. In doing so, I assess the extent to which the TJ process affects socio-political transformation in Nepali society as a whole.

CHAPTER III

TRANSITIONAL JUSTICE (TJ)

Transitional Justice is a rapidly burgeoning multi-disciplinary field of study and practice whose definition and scope can vary depending on a multitude of factors. There are fundamental tenets that have been established within less than a century of study and praxis, yet there is no one right way of starting, continuing, and ending a TJ process. In this chapter, I provide a general overview of TJ, including some of the limitations and criticisms of the process that have emerged in recent times.

The main idea behind Transitional Justice is to address the human rights and humanitarian law violations per the needs of victims and survivors. TJ looks not only in the past to right the wrong, but also looks forward to addressing the issues that instigated the violations in the first place. It should also provide means and guarantees to avoid similar situations in the future. The United Nations provides a broad definition of TJ as,

compris[ing] the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof (UN Secretary General, 2004, p. 4)

This definition expands upon the already strong ‘rule of law’ aspect of TJ⁶. Whereas the majority of TJ processes (as I will elaborate in this chapter and Chapter Five) focuses on strengthening legal institutions and focuses on prosecutions in order to curtail legal impunity, the definition provided by the UN incorporates other forms of discipline,

⁶ Rule of Law refers to the focus and adherence of legal avenues both in terms of national and international laws. See the section on *Legalistic TJ* in this chapter for more discussion.

providing a more holistic approach. The UN definition, although intentionally vague, highlights that TJ is not just a single process but rather a toolkit or a collection of multi-pronged measures of varying importance needed to address the complex issues where TJ is warranted. Out of the three objectives laid out by the UN - accountability, justice, and, reconciliation - only one, reconciliation, can be considered as explicitly forward-looking, whereas the other two emphasize the point that TJ, as the name suggests, is concerned with addressing the 'transition' that took place and aims to look in the past to move forward.

Alongside the United Nations Office of the High Commissioner for Human Rights (OHCHR), another institution at the forefront of work on TJ is the International Center for Transitional Justice (ICTJ). The ICTJ was created in March 2001 "to explore strategies for helping societies focus on the rights of victims in dealing with legacies of massive human rights abuses and pursuing the search for sustainable peace" (ICTJ, 2019). On the definition of TJ, the ICTJ elaborates the need for multiple grave violations to warrant an auxiliary judicial body to assist the already-burdened regular justice system. The supporting ad-hoc institution created could be non-judicial in nature too. The ICTJ further mentions that the need, and accordingly the creation of TJ, is very context specific and requires innovative ways of addressing the issue with four normative methods used in various forms and degrees: criminal prosecutions, truth-seeking, reparations, and (institutional) reform. These four primary methods each adhere to ensuring the four main tenets of TJ: deliberating justice, providing truth, adequate and appropriate reparation, and working towards ensuring non-recurrence of the past events. Figure 3 shows how these main ideas are enshrined within the Convention for the Protection of All Persons

from Enforced Disappearances (CED), adopted on 20 December 2006 by the UN General Assembly and entered into force on 23 December 2010. Nepal is not a signatory to the Convention.

| Right to Justice, Truth, and Reparations in the CED | |
|---|---|
| Component | Related Articles |
| Right to Justice | <ul style="list-style-type: none"> • <u>Art. 6</u>: States must hold actors involved in an enforced disappearance (ED) criminally responsible • <u>Art. 7</u>: Requiring that an adequate penalty be attached to EDs • <u>Art. 10</u>: States must take into custody persons suspected of committing an ED • <u>Art. 13</u>: Preventing impunity from the commission of an ED • <u>Art. 14</u>: States must collaborate to bring about criminal prosecution for an ED • <u>Art. 25</u>: States must prevent and punish harms done to children through EDs |
| Right to Truth | <ul style="list-style-type: none"> • <u>Art. 12</u>: States must protect individuals' right to report EDs; and States must investigate whenever there are reasonable grounds for believing that an ED has occurred • <u>Art. 15</u>: States must assist in "locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains" • <u>Art. 18</u>: States must provide findings to surviving families of a disappeared person • <u>Art. 24(2)</u>: Provides for the victims' right to the truth • <u>Art. 25</u>: States must investigate when harm is done to children through acts of ED |
| Right to Reparation | <ul style="list-style-type: none"> • <u>Art. 21</u>: States must ensure that released individuals, who were previously deprived of liberty, be able to fully exercise their rights at the time of release • <u>Art. 24</u>: Provides for the right to reparation, including compensation and, as appropriate, restitution, rehabilitation, satisfaction, and guarantees of non-repetition |
| Guarantees of Non-Recurrence | <ul style="list-style-type: none"> • <u>Art. 17</u>: States must clarify their modalities of detention • <u>Art. 22</u>: States must punish conduct that impedes the fulfillment of their duties • <u>Art. 23</u>: States must train and educate personnel who may be involved in the detention of individuals • <u>Art. 25</u>: States must establish procedures that address wrongfully adopted children in cases of ED |

Figure 3: Right to Justice, Truth, and Reparations in the Convention for the Protection of All Persons from Enforced Disappearances (CED) (Hall, 2014, p. 26)

GROWTH OF TJ

Ruti Teitel⁷, a prominent authority in the Transitional Justice field, legalistically defines TJ as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes” (Teitel, 2003, p. 69). She looks at “[the] close relationship between the type of justice pursued and the relevant limiting political conditions” (p. 69) and proposes a genealogy spread along three phases: Phase I (Postwar 1945); Phase II (post-cold-war, after 1989 that started with mass democratization); and Phase-III (“steady-state” what she sees as the beginning of the era of “normalized law of violence”). These phases show the development of ideas as TJ progressed based on the political climate, and the gradual globalization of international laws.

Even though Teitel concedes that modern TJ has its roots in WWI and even earlier, her genealogy begins after 1945, which saw the most comprehensive and global reach of TJ for the first time in the form of the Nuremberg Trials. Because the political makeup leading up to the trials was so extreme and distinct, these trials comprise her only substantial example in Phase I. However, this phase did give rise to and promoted the use of modern human rights law in holding states accountable, which created a vital precedent for the rest of the phases. In addition, the crux of TJ came to be atonement for the past while holding people and states accountable through prosecution based on international law and standards.

Phase II began with the domino effect of mass democratization started in the late 1980s due to the deterioration and eventual dissolution of the Soviet Union and its

⁷ One of the first persons to use the term to encompass its current definition

influence. With most of the political climate focused on regime change, along with holding institutions and officials accountable within the country, more nuances to TJ started to emerge. Retributive justice, as was the case in Phase I, was not the sole option, and multiple views of “justice” started to emerge. Justice went from a linear function to a complex analysis “situated in the actual political realities and in the transitional political context, which included the features of the predecessor regime as well as political, juridical, and social contingencies” (p. 77). The scope of TJ expanded from focusing on punishment to healing victims and integrating diverse values related to peace and reconciliation on a societal level. In addition, there was a distinct focus on nation-building with institutional reforms not only to create a functional pathway to achieve justice, but also to legitimize the governmental authorities who were at the helm of creating and directing TJ processes.

However, Phase II also brought about the often-cited dilemma in TJ processes regarding the disjuncture between peace and justice, where in order to maintain peace, justice is restricted to what Teitel refers to as “Preservative Justice” (p. 81). This phase saw the addition of political and moral authority to the process in addition to the already present legal authority. Nevertheless, with the regime in power often implicated in past atrocities in some form, political authority was much diminished. In addition, because moving forward within the TJ process involved looking back, the question of who gets to define historical facts both for evidence and posterity and under what terms started to become a contentious issue.

The third and current phase, according to Teitel, is a “normalization” of TJ, or a “steady-state,” where the legal field is further expanded with the addition of humanitarian

law in conjunction with human rights law⁸. More importantly, it is Teitel's observation that TJ in some respects has moved away from only addressing extraordinary circumstances of the past to include any ongoing present issues that fall under the purview of international criminal law. The main issue with Phase III can be seen by examining the trials of Slobodan Milošević and Saddam Hussein as pointed out by Teitel (2005) herself: She concludes that the trials could be used as a guise for "humanitarian intervention", and that some forms of TJ are already serving that purpose. Most of the casework and building of the TJ infrastructure in the two trials was carried out while the conflict was still ongoing and thus the focus was distinctly on regime-change. Yet there is lack of proper understanding of the exact "transition" and the rule of law "because of the complexity and the scope of the sought-for normative change in terms of *war-time justice*⁹, nation-building and post-conflict justice" (p. 845). Moreover, Phase III and anything beyond has seen a return to a more legalistic nature and integration of TJ within the broader International Humanitarian Law (IHL) resulting, as in the case of Nepal, in the takeover of the process by strong actors, nationally or internationally, to serve their own means, which in turn leads to the dilution or denial of needed justice and/or peace. This has been one of the main criticisms of the TJ process.

⁸ The main inclusion of Humanitarian Law and its effect is that since all states are bound by the rules of Customary International Law which explicitly prohibits providing any sort of amnesties for persons suspected or accused of committing war crimes or crimes against humanity.

⁹ Emphasis mine

LEGALISTIC TJ

The popular onset of the focus on human rights, and legitimizing the government, started with the fall of authoritarian regimes during the period of Third Wave of Democratization¹⁰(Arthur, 2009). Arthur (2009) claims that “the phrase ‘transitional justice’ [was] itself a response to a set of new problems and a means of legitimating the practices used to respond to those problems. [These] practices were prosecutions, commissions of inquiry, purges, and restitution policies” (p. 329). Even when the intentions to achieve peace are genuine, with an emphasis on legalism spearheaded by the government, the TJ process becomes “something which ‘belongs to’ others - chiefly lawyers, policymakers, and state officials” (Kieran McEvoy, 2007, p. 413). McEvoy confirms that when the state or state-like institutions take the legalism-focused helm “the stewardship of transitional justice in such institutions mitigates against developing lines of ownership and accountability to the communities they were designed to serve” (p. 424). In cases especially where the state itself has been the main perpetrator of war-time crimes, the authority to see through legal matters could lead to unjustifiable amnesties, or alternatively the language of human rights is used as a stringent call for prosecutions with little to no focus on reconciliation or other immediate victims’ needs. This top-down assertiveness has been one of the main criticisms of the TJ process. In order to get the most out of the TJ process, McEvoy implores us to question the validity of TJ for *whom* and for *what*.

In the search for a top-down justice brought about by criminal prosecutions, individual actors or local groups’ concerns and needs are often not addressed. When a TJ

¹⁰ For more information on the Third Wave of Democratization refer to Huntington (1991)

process orients itself on the basis of legal empowerment and prosecutions in most cases the existing judicial system in place is never adequate to properly address and carry out judgements. Regardless of whether the push to prosecute is managed by the state or if local actors and survivors are encouraged to follow the legal path, “justice sector reform, appropriate procedural rights, legal education and knowledge about the courts, among others are often precisely those likely to be lacking or require improvement after conflict or political violence” (Kurzea, Lamont, & Robins, 2015, p. 261). These judicial aspirations require deeper structural changes, not just legal reforms. Kurzea et.al (2015) make a bold claim of moving away from a rights-based approach in multiple cases of TJ mechanisms. They concede that legal empowerment has been crucial in lifting marginalized and disadvantaged groups once the tool went beyond just rigid development scholarship¹¹ and aimed to uplift local actors. Likewise, there is an immediate need to move away from looking at TJ from a prescribed notion of what needs to be done, before even assessing the local context and consulting with all relevant stakeholders. The authors narrow the main issues to “power, space, and actors” and a desperate need to stay away from an “elite driven and donor-centered policy implementation” (p. 264). But even before getting to the point of implementation of TJ mechanisms, the choice of considering TJ as a way of moving forward post-conflict can already be mired by political aspirations rather than the pursuit of ‘justice’ and victims’ needs. Empirical studies have shown that TJ mechanisms, focused on non-legal methods, are most likely to

¹¹ Rigid development scholarship follows a mostly top-down approach where providing money, either to individuals or governments as has been successful in the past in some cases, would result the same in any situation. It takes the notion of a “one size fits all” attitude. Moving past focusing on just developmental scholarship incorporated participatory methodology that allowed the community and groups that were being helped to be an integral part of the process itself. This allowed the groups and communities to take ownership of the projects instead of just being seen as receiving charity.

be implemented in cases where there is a negotiated agreement between the factions. On the other hand, a one-sided victory tends to be focused on carrying out criminal prosecutions of the defeated side within the existent criminal justice system (Kim & Hong, 2019). The same hypothesis seems to hold true in the case of Nepal, where without a definite victor the emphasis has been on ‘moving forward’. However, this ideal has been promoted by the political parties and the government who were involved in the civil war rather than the victims themselves.

CHAPTER IV

THE NEED FOR TRANSITIONAL JUSTICE IN NEPAL¹²

The Royal Massacre that occurred in 2001 was pivotal in Nepal's history as the change in the governance structure that transpired after the massacre not only led to the surge in violence, but eventually led to the end of the conflict itself. The statement in itself is a simplification of a protracted conflict with multiple actors and events that has been extensively researched across several disciplines, multiple timeframes, and regions (Hutt, 2004; Thapa & Sijapati, 2004; A. Adhikari, 2014).

In this chapter, I will briefly highlight the political and social history of Nepal to provide a background into some of the discontent behind the beginning of the civil war. I also chronologically emphasize some of the major events that escalated the conflict, which in turn led to the end of the conflict through a negotiated agreement between the Communist Party of Nepal (Maoist)¹³ who led the civil war, and the seven major political parties who at various points were fighting the Maoists as representatives of the Nepali state apparatus.

LEADING TO THE BEGINNING

Democratic principles and the rule of the people is still a rather new concept for Nepal. The current nation-state was formed with the conquests of neighboring

¹² For a timeline of some important political and TJ-related events from the beginning of the conflict until 2019, see Appendix D. For an even more detailed and extensive timeline of the conflict that lists political developments and significant instances of violence with five or more deaths, or killings or disappearances of significance, as well as “significant constitutional and political events [related to the conflict] in Nepal’s history prior to 1996 up to the signing of the CPA in 2006, please refer to Annex One of (OHCHR, 2012)

¹³ Henceforth referred to as Maoists

principalities by King Prithvi Narayan Shah¹⁴ in 1768, who described Nepal as a “garden of 4 castes and 36 ethnicities.”¹⁵ The 104-year long autocratic hereditary Prime Minister (PM)-ship rule of the Ranas began in 1844 AD. The Ranas, Jung Bahadur Rana being the first, placed themselves as the de-facto rulers of the country by brute force that included massacres of rivals and nay-sayers while the Shah dynasty was kept for mere namesake. This period laid the groundwork for the corruption and looting of state resources by state authority and enforced the notion of “*chakari*” (using flattery to improve one’s social standing in order get ahead socially or get any gains) and “*afno manche*” (affiliation-based nepotism), which is still persistent across Nepali society, and even more so as a political tool for gain (Lal, 2001). The first notion of a constitutional state first saw semblance in 1951 through political revolt. It led away from the patrimonial state heralded by Prithvi Narayan Shah and led up to the Rana’s “extractive patrimonial” period. Then King Tribhuvan worked with the Nepali Congress, and the Indian Government to seek political asylum in India in order to force talks with the Ranas,

¹⁴ There has been some debate on the revisionist history regarding if Prithvi Shah was truly a unifier or if he was a brutal (colonial) expansionist who committed mass atrocities, especially towards the Newars. His date of birth used to be celebrated as National Unification day but was for 11 years from 2007 until 2018. A large portion of Royalists, who are fighting for the reinstatement of the monarchy, have advocated this issue. This case gives a sense of how history can be judged not for the actions, but for the outcomes in the future. However, history can always be revisited and reanalyzed as this examples shows (RSS, 2019); (RSS).

¹⁵ It can be said that his ascension was the beginning of the rule of the Hindu *Khas/Arya/Tagadhari Bahun* and *Chhetri* caste. Even to this day there is a great discrepancy in terms of the influence of this group, which amounts to about 29 percent of the population, but holds the majority of power, primarily in our case in terms of political and public space. According to the most recent census of 2011 there are now 126 castes/ethnic groups, with Chhetri having 16.6 percent (4,398,053) of the total population, Brahman-Hill (12.2 percent; 3,226,903), Magar (7.1 percent; 1,887,733), Tharu (6.6 percent ; 1,737,470). Similarly, there are 123 languages spoken as a first language. Nepali by 44.6 percent (11,826,953) followed by Maithili (11.7 percent 3,092,530), Bhojpuri (5.98 percent; 1,584,958), Tharu (5.77 percent; 1,529,875) (Nepal government, 2011, p. 3).

which led to the downfall of the Rana regime¹⁶ with the Delhi Compromise (D. R. Dahal, 2010, p. 21). However, instead of fighting for a more democratic system, the resulting deification of the monarchy as a symbol of Hindu religiosity was attached to the identity of the State. At the same time Nepal opened its door to the international community, including aid organizations and multilateral and bi-lateral donors, and the experiment in democracy began. However, this experiment was very short lived as after the promulgation of a new constitution and the first general election in 1959, King Mahendra removed the government from power in 1960 and banned all political parties in 1961.

There were no protests in Nepal over the King's move, but with the advice of Jawaharlal Nehru in India, Subarna Shamsher, a member of the Nepali Congress who was in India, gained support from some members of other parties who had fled there, and soon started launching raids against across the border. Mahendra was already shook by the raids by 1962, and an unofficial economic blockade by India put more pressure on him. However, with the beginning of the Sino-Indian War, Nehru, in need of Mahendra's help, got Subarna Shamsher to let go of what could have been a restoration of democracy. However, the brief conflict in 1962 still saw the deaths of 77 insurgents, 31 security forces, and 21 civilians (Whelpton, 2005, p. 99). With the Sino-Indian war taking away India's interest in Nepal's possible political upheaval, King Mahendra was free to form his own system of governance called *Panchayat*, a "welfare-based soft authoritarian state" (D. R. Dahal, 2010, p. 13) and soon promulgated a new constitution in 1962. Even

¹⁶ The Ranas, in a last-ditch attempt to maintain a semblance of power, declared Tribhuvan's grandson Gyanendra as the King, but the Indian government would not accept him as the new king. This was one of the first instances where external actors had a prominent role both in putting pressure on the government and negotiating an agreement. After the agreement, the Rana entered the political fray and formed a coalition government with the Nepali Congress until the election.

though the locus of power was still the king, he made sure to implement reforms that would benefit the status quo, and some reforms were directed at the rural population. This was the basis of the introduction of the new *Muluki Ain* of 1963,¹⁷ which sought to address some structural changes in order to gain favor from the population. However, thenceforth the reforms in the new code were more lip-service rather than an actual implementation to uplift the marginalized. In 1969, Hari Prasad Pradhan was appointed¹⁸ as the first Chief Justice of Nepal, and with his experience serving in the Indian judiciary, he enacted the *Commissions Inquiry Act*. This became the basis of future ad-hoc investigative committees. However, it is believed that the act was actually “promulgated by King Mahendra in 1969 to divert accountability for crimes into a political process that sidesteps the criminal justice system, and to “institutionalize impunity””(International Commission of Jurists, 2012a, p. 4). The same theme has been one of the criticisms of the political nature of the TJ process, and there have been cases of formation of a special court as part of the Truth and Reconciliation Commission (TRC) that can grant amnesty based on the fulfillment of certain conditions.

Even after the death of King Mahendra in 1972, his successor King Birendra upheld the principle themes of the Panchayat era, namely “active monarchy, a partyless system, development, modernization, decentralization, and nationalism” (Whelpton,

¹⁷ The original *Muluki Ain* was promulgated by Jung Bahadur Rana in 1854 and informed the hierarchy of the caste system where every caste had its own responsibility and there was no room for social mobility or advancement. Rana’s code also codified *Sanskritization*, which to this date is one of the main reasons there exists immense socio-political, and economical privilege for men of higher Hindu caste. (Whelpton, 2005, p. 58) Also, the exclusion of the Madhesh population from the shared Nepali identity and the higher ranking of Hill elites as opposed to Terai/Madhesh was started in 1854, and in some form persists till now.

¹⁸Pursuant to the *Nepal Pradhan Nyayalaya Act* 1951

2005, p. 173).¹⁹ Even though the system was challenged by dissenters, mostly students, and forced to hold a referendum, the “agenda for improving the *Panchayat* system still received 55 percent of votes, against the 45 per cent for a multiparty system” (Hachhethu, Kumar, & Subedi, 2008, p. 99). The Cold War helped bring in foreign aid, and along with it the donor culture was quickly established with the elites in the capital being the intermediaries of progress. Even though a regressive political system, the *Panchayat* era heralded “the expansion of economy, administration and public sphere [which] set free the critical mass of change agents whose demand for political participation [eventually] restored multi-party democracy in 1990” (D. R. Dahal, 2010, p. 13). However, Dahal (2010) critiques the development spur as being too short-sighted and while it may have planted the seeds of resistance politically, on a state level what occurred was

[a reduction in] the capacity of Nepali state to govern and resolve conflict [with]: neo-liberal globalization and liberalization limit[ing] the autonomy of Nepali state in policy making and setting national priority; homogenized economic policies of political parties compressed the democratic process and alternative social vision; and preference for group-enclosed non-state actors, NGOs, human rights groups and civil society offered universal consciousness of modernity without transferring necessary resources to translate participatory democratic projects into reality and improve the local perception of state legitimacy (p. 15)

The unofficial blockade by India in 1989, because of “administrative reasons” in response to King Birendra’s refusal to revert back to restrictive trade agreements, showed the fragility of the state’s response in handling crises and gave a momentum boost to the plethora of parties of the entire political spectrum to work together to make another attempt at restoring multiparty democracy. The Nepali Congress worked with the United

¹⁹ The nationalism was very much entrenched within the twin pillars of Hinduism and Nepali language. This is still an issue to date where the issue of identity, especially how it relates to the nation as a whole in addition to personal and local identity, is still not determined. The imposition of culture and rituals of a specific minority ethnic group to the entire country is not only unfair to the marginalized communities, but it is also an invitation for conflict to arise if not dealt with using constructive dialogue.

Left Front – an alliance of seven communist parties – while some other fringe parties decided to protest on their own. This was the beginning of the *Jana Andolan* (People’s Movement), the end of the Panchayat era, the reinstatement of a multiparty system, and the early beginnings of the decade-long civil war.

Jana Andolan started as a peaceful protest meant to show the discontent against the state, with as many as 200,000 people marching together at one point. However, it also saw lethal violence used against the demonstrators (Seddon, 1994, p. 138). As per the *Commissions Inquiry Act of 1969* in the aftermath of the movement, a three-member commission, the Mallik Commission, was tasked to investigate the abuses committed by the *Panchayat* government. Formed on 23 May 1990, it submitted its report on 31 December, 1990. In the span of 50 days, 45 people had been killed and 23,000 had been injured. A hundred officials and politicians were directly or indirectly implicated. However, just two months after the commission had been formed, it was expressed through a cabinet resolution that the state’s priority was on holding elections. The committee’s recommendations were ignored even before its publication. After the publication of the report calling for prosecutions, the Bhattarai-led interim government withdrew 1,150 cases and the Attorney General refused to prosecute based on false report of lack of evidence. Similarly, the government made it clear that “maintaining law and order was more important in the face of social unrest as prosecuting police perpetrators would demoralize the police force” (International Commission of Jurists, 2012a, p. 8).

The priority of political parties in favor of business-as-usual and ‘moving forward’ set a poor precedent for future political actions where grave human rights violations and killings could be justified in the name of politics and development.

BEGINNINGS OF THE REVOLT

The Communist Party of Nepal was established in 1947 by Pushpa Lal Shrestha. By 1990, the party had splintered into various sub-factions that were divided under ideological lines spread across the spectrum. Some even supported the monarchy, while others were discontent with the results of the 1991 elections and resorted to tactics such as *bandhs* and demonstrations to press their demands. The extreme left parties were also participating in elections as the United People's Front (UPF), in which they came out as the third largest party. The UPF split into two factions in 1994: one was recognized by the Election Commission and failed to get any seats whereas the other that was disqualified from running went on to rename itself the Communist Party of Nepal (Maoist) (CPN-M) (Hutt, 2004, p. 5) and was led by Pushpa Kamal Dahal²⁰ and Baburam Bhattarai. The Maoists had already started to spread their message in the districts where the UPF had won electoral seats, especially in Rukum and Rolpa, districts that had high levels of horizontal inequalities and where disillusionment with the government was already strong (Tiwari, 2008). Some authors, e.g. Muni (2010), argue that, had the major parties been more receptive to the Maoist's demands as a long-term partner in the transformation of the Nepali political and social structure, it could have delayed or even weakened their immediate need to initiate the 'people's war'. Nonetheless, it is widely believed that given its excessively small size as a party and lack of public support, their inclusion in mainstream politics would not have had much impact in propagating their social, political, and cultural development plans.

Ex-PM Sher Bahadur Deuba and Prachanda were rivals even before the civil war,

²⁰ Henceforth referred to as his nom-de-guerre Prachanda

and during his first tenure (1995-1997) as PM during the civil war, Sher Bahadur Deuba even placed a five-million-rupee bounty on Prachanda's head. "Operation Romeo" initiated the conflict on November 1995 in Rolpa, Rukum and Dang where "police forces conducted a broad sweep of several villages, arresting individuals without warrants and subjecting them to torture. Nearly 6,000 residents were driven out of their villages, and more than 130 people were arrested without warrants" (Norris, 2004, p. 1). The gross violation of human rights that occurred in the incident bolstered the Maoist support instead of eradicating their base. Large numbers of people were arrested without strong evidence of being Maoist supporters, and the stronghandedness shown by the state only served to increase the number of people who now had a direct grievance against the government. The incident also helped the Maoists to increase supporters with the promise of protecting civilians from unwarranted state violence. In response to Operation Romeo, on 4 February 1996 Baburam Bhattarai submitted a 40-point demand to the Government of Nepal with the warning of armed struggle if the demands were not addressed within two weeks. However, before the deadline on 13 February 1996, the violent decade-long civil war had begun.

The Nepali Congress-led government in 1999 formed an ad-hoc group, High-Level Committee to Provide Suggestions to Solve the Maoist Problem, which concluded that it was the state's inability to assert its "monopoly on violence" that led the Maoists to proliferate. The Nepali Congress' own party's stance was to point to 'unseen powers' and ideals that were driving them, rather than the inequality the Maoists said they were trying to address. On the other hand, the Communist Party of Nepal (Unified Marxist Leninist)²¹

²¹ Henceforth UML

solely blamed the Nepali Congress since they had been leading the government during most of the conflict period (Thapa & Sijapati, 2004). Baburam Bhattraï himself, in his PhD dissertation, asserts that unjust land ownership policies kept Nepal and its populace from developing and was one of the main reasons for the rebellion (A. Adhikari, 2014, p. 18). Even though we cannot, even after the end of the conflict, fully determine whether all of the Maoists' rhetoric and the goals they set out to achieve were merely a plan to get ahead politically, it can be said that they were right in assessing the discontent within the country and chose their base of operations accordingly. The first phase of Maoists attacking strategy to propagate 'people's war' contained

decentralised actions within centralised plan and command; balance between political and military offensives against the enemy; political justification of military action; utilisation of the contradictions amongst the enemies to isolate the main enemy; organisation and mobilisation of the masses in the quickest and best possible way (Muni, 2010, p. 34).

Considering that the Maoists were up against the entire state apparatus, their strategy worked in their favor and they quickly started gaining more followers and areas that they controlled. However, the methods that were used by both the state and the Maoists were not in accordance with human rights practices or laws. The killings became more brutal and public (S. Adhikari, 2019) and became a means of exalting strength and sending a message, as opposed to being a result of deaths while in active combat (Bhandari, 2011). The numbers of victims of the civil war quickly started to rise.

The response from the state to curtail the Maoist issue fell on the lap of the Nepal Police, who were emboldened by officials at the highest local levels who condoned using any methods to quell the insurgency. Until 1998, Maoist attacks were mostly in response to the brazen killing, torture, and disappearance of suspected-Maoist cadres. The notion

that “terror must be created to control terrorism” rang through the Nepal Police forces, which led to intense scrutiny of anyone who was suspected of being not only part of the party, but even a sympathizer (A. Adhikari, 2014, p. 41). The police force felt unfettered from holding back their animosity towards the ‘enemy’, which often was directed at locals while interrogating and looking for Maoists. This led to many civilians getting the brunt of violence, which bought the Maoists sympathy. The Maoists also started to declare anyone killed or disappeared by the state apparatus as ‘martyrs.’ While the state was indiscriminate in their actions, the Maoists were more specific in their brutality.²² The majority of their torture and killings were directed at Nepali Congress members, but that was not always the case. Each side directed violence towards anyone they thought was working with the other side regardless of proof, and even then, the violence was excessive (A. Adhikari, 2014).

As the conflict started incurring human casualties, there were other issues plaguing the country that saw lives being taken away as well. In 1998, 550 people died in Humla-Jumla due to “hunger, neglect, and pestilence” (D. R. Dahal, 2010, p. 16). As would be the case up to the end of civil war, many other issues were put on the backburner as all resources from within and outside the state were primarily focused on the conflict and its repercussions. The state, post-1990, did try to empower ‘excluded’ groups such as women, indigenous communities, and Dalits (lower castes), and “co-opt them into the state apparatus” (Manandhar, 2010, p. 9). However, some marginalized

²² In response to the rise in victims and the brutality of the war, the National Human Rights Commission (NHRC) was finally established in 2000.

groups such as the “Madheshis”²³ were not even recognized as an excluded group. The recognition of exclusion was at the hands of the oppressors. The Maoist movement fortified the demand for rights and equal justice and was even a means of educating marginalized groups about their rights. This increase in awareness and self-advocacy can especially be seen after the end of the conflict when the ideals the Maoists had brought through their 40-point demand emerged into the forefront of Nepali politics. These ideas throughout the conflict itself were ignored by the State, which regarded the Maoist rebellion as a threat to national security and a takeover of the State’s apparatus. The argument of the state is in part shown to be true by Acharya (2009) who looks at conflict through the lens of a political economy approach. Acharya assesses what factors within economic conditions, geography and infrastructure, political activism, grievances, caste and ethnicity, and ideology are statistically significant to affect the intensity of the violence. He finds that less penetration of roads along with forest coverage were both directly proportional to the intensity of the violence, as those conditions were favorable for guerilla warfare. Acharya (2009) also points out that rather than operating the conflict due to grievances, it moved forward out of the necessity of the locals for security and for the promises made by the Maoists. The Maoists were very deliberate in both the location and timing of the start of their campaign of violence. Similarly, as their physical and ideological reach spread across the country, they had carefully planned where to set up

²³ Madheshis are an ethnic minority living in the southern plains of the country who share linguistic and cultural similarities with population from Northern India. Although they are Nepali citizens, because of their physical and cultural closeness with the Indian population, they have been a highly marginalized group, and with constant prejudices against them have to fight for their right to be seen as Nepali. For more discussion on the contemporary issues plaguing the Madheshi population, refer to the section of *Federalism and Identity Issues* in Chapter Six of this thesis. Also, more data and resources to learn about the group’s struggles and the ongoing fight for their rights can be accessed at <https://www.madhesiyouth.com/> as a starting point.

their shadow government that would rival the state's in many rural parts of the country.

DIRECT AND BRUTAL VIOLENCE

There were a great number of deaths that occurred during the course of the civil war, as shown in Figure 4. Joshi and Pyakurel (2015), using individual data collected by the Informal Sector Service Center (INSEC)²⁴ on all the fatalities of the civil war, provide several insights from the data. The death toll, depending on multiple sources, is in the range of 13,000 to 16,500 confirmed deaths of which “88% of all victims were killed during the conflict, and about 30% of those were killed in combat fighting” (p. 607). This suggests that more than two-thirds of those killed in Nepal were killed in a noncombat setting. Similarly, 80 percent of the victims belonged to lower-middle or lower economic status, and 83 percent of the victims had education of high school or below (p. 609).

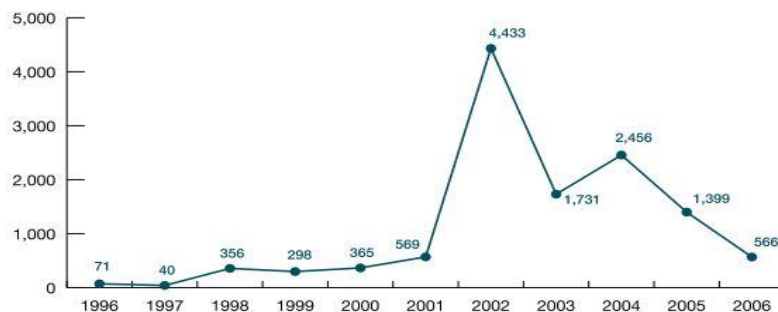


Figure 4: Number of fatalities during the people's war in Nepal (1996–2006) (The Asia Foundation, 2017, p. 119)

The *Nepal Conflict Report* by OHCHR also provides detailed information

²⁴ A prominent human rights organization working on human rights issues in Nepal since 1988. “INSEC documentations on victim are archived at <http://www.insec.org.np/victim/>. Many of these documents that are relevant in investigation of human rights and international humanitarian law violations during the insurgency are cross-referenced in the United Nations Human Rights Office of the High Commissioner's Nepal Conflict Archive (<http://nepalconflictreport.ohchr.org/>)” (Joshi & Pyakurel, 2015, p. 602)

pertaining to incidents and timeline of extrajudicial killings, enforced disappearances, torture, sexual violence, and arbitrary arrests, thus creating a comprehensive argument as to the need of TJ mechanisms to address the issue of attaining justice and truth for those seeking it (OHCHR, 2012).

Figure 4 also highlights the drastic surge in violence after 2001, in part due to the sudden change in conflict actors and methods after the Royal Massacre in June. Until 2001, the Royal Nepali Army (RNA),²⁵ despite all its military might, was not asked to be an actor in the conflict. However, with the death of King Birendra and all of his immediate family, his cousin King Gyanendra rose to power. He would turn out to be the architect of bringing the warring factions into agreement, but not before the violence and brutality of the conflict had reached its zenith. The terrorist attacks in New York in 2001 also led to material and moral support from the US to fight the Maoist insurgency. The Maoist group, for the first time since the conflict began, were deemed as “terrorists.” After a failed short attempt at negotiations before September 2001 between the state and the Maoists, the animosity between the two factions resulted in more violence across the country. Simultaneously, on 26 November 2001, the Nepali Government declared a state of emergency and enacted the Terrorist and Destructive Activities (Control and Punishment) Ordinance (TADO), which saw the RNA use their discretionary military prowess with additional international support. This resulted in an increase in human rights violations. The violence committed by the RNA, and the general state of fear, distanced the public more from the State’s case. King Gyanendra dissolved Parliament in May 2002 and soon began his aspiration of direct rule, akin to his father King Mahendra.

²⁵ Now known as just Nepali Army (NA); I use RNA for the period the army was involved in the conflict.

However, whereas Mahendra's policies, even if just on paper, sought to uplift some of the marginalized population, Gyanendra's assurance of state security for its population through rampant military action produced the opposite result. After it was clear that the only way Gyanendra sought to end the conflict was total military victory regardless of collateral damage, the Maoists gained more sympathy from the populace who were being terrorized by the State itself. The Maoists provided the protection to rural populations and a sense of security, and they seized on this new found soft-power (Adhikari & Samford, 2013). On the other hand, it is during this time the Maoists also formed the People's Liberation Army (PLA) to try to match the Army's might.

The second phase of the Maoists' 'people's war' strategy seemed to be that of hoping for a stalemate at best, as the global community would not validate their claims given the international climate. The Maoists' wishes for a stalemate came to fruition after King Gyanendra took control of all power in 2005 as part of the "creeping coup" he had initiated in October 2002" (Dixit, 2011, p. 122). And just like that, there was a common enemy for both the Maoists and the expunged mainstream political parties, who came together as the Seven-Party Alliance (SPA) and signed a 12-Point Understanding with the Maoists in November 2005. This Understanding led to the 19-day long *Jana Andolan-II* (Second People's Movement). The reinstatement of the parliament officially began the Peace Process between the Maoists and Girija Prasad Koirala of the Nepali Congress. The first major step of the process was the signing of the Comprehensive Peace Accord (CPA) which laid out in no specific terms the details that were to be used to initiate the Transitional Justice mechanisms in Nepal.

CHAPTER V

TRANSITIONAL JUSTICE MECHANISMS IN NEPAL

The proper initiation and implementation of TJ has been a rallying cry, for more than a decade now, of multiple groups and individuals within the victims and survivor community.²⁶ In the case of Nepal, Robins (2012) argues that much of the Transitional Justice mechanisms that have been proposed by international and national agencies, based on principles of human rights, follows a more legalistic and western-influenced tradition that fails to address the structural issues prevalent within Nepali society. In turn, this helps continue the status quo, and further takes away the agency of the marginalized and instead places it into the hands of socio-political and economic elites. In a different study, Robins and Wilson (2015) claim a change in the “transitional justice research paradigm” would provide victims appropriate means to voice not only their opinions and concerns about the outcomes they would like to see, but also to have a say in the processes leading to the desired outcomes. They argue that the emphasis on reparation and restoration, in the current trend, rests on values ascribed by western ideologies and focuses on restoring institutional capacity rather than adjusting as per the requirements of victim groups. Similarly, some researchers have also contested that the “light foot” approach of the international community, particularly the UN agencies, with not enough pressure on the Government of Nepal (GoN) to conform to international standards, was in part responsible for the emergence of TJ discourse. However, the narrative, although local, was almost entirely elite-driven, which further added to structural inequalities

²⁶ Victims here refer to those individuals or groups who were affected physically, psychologically, or who had their personal property damaged. Survivors in this case refers to individuals who had their loved ones killed or disappeared.

present in Nepal. The ruse of maintaining “localization and self-determination” purported by the political and social elites hampered the international community’s legitimate chance of preventing the fallback to pre-civil war era of centralization of power and the marginalization of lower economic and social groups, and in this case the double-marginalization of conflict victims (Westendorf, 2018, p. 248). The basis of ‘victimhood’ and needs of those victims were also delineated along the lines of the status quo that had entrenched structural inequalities.

TRUTH AND RECONCILIATION COMMISSION (TRC) AND COMMISSION OF INVESTIGATION ON ENFORCED DISAPPEARED PERSONS (CIEDP)

The road to the formation of the two TJ commissions was arduous and full of deception. It started with an ordinance adopted by the Council of Ministers on 27 August 2012 led by PM Baburam Bhattarai, and was hastily sent off to then President Ram Baran Yadav to sign and promulgate. The myriad issues with the ordinance begin with the fact that it was created after the Constitution Assembly (CA) was dissolved and the caretaker government, in cahoots with leading political parties, created the ordinance. The ordinance allowed for non-prosecution and amnesties even for people who had committed gross human rights violations, including torture, enforced disappearance and crimes against humanity. The ordinance would also have allowed for reconciliation processes to proceed without any request or involvement of either the victim or the perpetrator. Similarly, if passed, the ordinance would have stripped the formed commission of any independence or impartiality as commissioners would be appointed by consensus among political parties, and the commission would also be reliant on

funding through the government (International Commission of Jurists, 2012b). However, after much furor from victim groups, the international community, and human rights organizations the ordinance never came to fruition. Hence, the first major attempt in forming a TJ commission was a blatant attempt by the political parties at shirking every accountability of war-time violations, and not even attempting to provide any relief to the victims.

The next iteration of the Transitional Justice Act (TRC Act) was passed by the Nepali Parliament on 25 April 2014 and approved by the President on May 2014 without making the text public at any point, or even allowing for any sort of public input, let alone from the victims. An immediate concern was put forth to the UN by Advocacy Forum - Nepal, TRIAL (Track Impunity Always), and REDRESS (2014). The groups' main concerns were in regard to following international human rights and humanitarian laws, and in turn reverting powers, including

Remov[ing] Section 22 of the TRC Act that grants the power to the commissions to mediate between victims and perpetrators even in cases of crimes under international law and gross human rights violations (p.11)

Removing Section 25(2) of the TRC Act that bars the commissions from making any recommendation for prosecution in cases where reconciliation is undertaken (p.12)

Amen[ding] prevent[ion of] amnesties for crimes under international law and gross human rights violations. The criteria for determining which acts qualify for amnesty should be clearly specified and limited to crimes not amounting to crimes under international law and gross human rights violations including grave breaches of the Geneva Conventions, crimes against humanity, torture, rape and other forms of sexual violence of comparable gravity, enforced disappearance, and extrajudicial, summary or arbitrary executions (p.14).

The 2014 TRC Act was seen by the Nepali and international legal community as re-wording of the 2012 ordinance to make it seem more inclusive, whereas the issues of

the fate and whereabouts of disappeared persons were still unclear. There was no clear procedure in providing security for victims during or after giving their testimony, who could be further victimized if the perpetrators were in social or political power. Technical and financial budgets for exhumation of bodies were not clearly stated. In addition, no clear mandate and power structure, along with independence of the entire commission, was clearly laid out as well. Importantly, there was a distinct lack of procedures to assure the right to reparation and reconciliation as per victims' needs. Overall, the Act was met with instant criticism and disapproval from legal experts and from victims. They submitted a writ in the Supreme Court to force the government to amend the act according to international human rights standards.

While the Supreme Court deliberated the 2014 TRC Act, two TJ commissions were created to address the issues of war-time cases: Truth and Reconciliation Commission (TRC) and the Commission of Investigation on Enforced Disappeared Persons (CIEDP). After a decade of wrangling, the two commissions only received a mandate for two years to collect, investigate and reconcile all civil-war cases.

The same year as the formation of the commissions, the Supreme Court ruled in favor of the victims rejecting the amnesty provision for serious human rights violations and the need for any amnesty to be provided only with the consent of the victim. Likewise, "the TRC [could not] investigate already pending cases in the courts and it [could not] ask the government to withdraw cases and recommend for amnesty as well"

(B. Dahal, 2015, p. 3). Even though the Supreme Court's decision was clear and direct, the government never fulfilled its obligation.²⁷

However, within the original two-year term designation of the commissions in 2015, and a hastily sought out one-year extension to carry out their mandate, the major output by the beginning of 2018 had only been a collection of grievances. At the end of their three-year tenure, the commissions had collected over 63,000 complaints, of which only 3,000 completed preliminary investigation. At the last minute, on 8 February 2019, President Bidhya Devi Bhandari authenticated the amended TRC Act bill that extended the commissions' life for one more year, with the possibility of another year's extension. However, the amendment did not consider the 2015 Supreme Court verdict that stated human rights violators should not be given amnesty, which also led to the resignation of various members of the commission not content with the scope of the amendments.

Since 2018, little progress has been made in addressing the cases, none of which has yet come to completion. Instead, in addition to the lack of resources the commissions faced in the last four years, they have been devoid of commissioners and officials since April 2019 when their tenure expired and never got renewed (Jeffery, 2019). Even though a committee was created right after to appoint new officials "top leaders of the ruling Nepal Communist Party and the opposition Nepali Congress are said to be in talks to share chairmen and members in the two commissions between the two parties" just as

²⁷ Instead "in June 2018 a draft amendment, which renamed the TRC Act the 'Transitional Justice Related Act' was circulated. While it did not make provisions for amnesties for serious crimes or prohibit prosecutions, the draft was criticized by legal scholars for following the "letter of the law" at the expense of the spirit of the law. Of particular concern, the draft amendment proposed the withdrawal of 350 conflict-related cases and the establishment of a special court with the power to hand down non- custodial sentences in some cases and to offer sentence reductions of as much as 75 percent in others" (Jeffery, 2019).

they did in 2015 (Ghimire, 2019a)²⁸. However, some political insiders have pointed out that even though the merger of UML and the Maoist party got them the majority, there is still reluctance amongst the UML members who were not as active in the conflict as the members from the then Maoist and Congress parties. The politicization, or just stalling, of the nomination process to fill the commissions has been so dire that even after five months of re-formation the posts remain empty. Instead, one of the only two non-partisan members of the five-person recommendation committee, Prakash Osti of the National Human Rights Commission (NHRC), resigned in protest. The resignation was to highlight the fact that more than likely the two chairpersons and four members each in the TRC and the CIEDP will be nominated on the basis of political consensus (Ghimire, 2019b).

Even though the commissions have already been provided three lifelines, there is still no concrete plan to move forward and no guarantee that the commissions will be renewed come February 2020. Nonetheless, with the omission of input from the affected individuals and communities in the process of choosing the commission members, a boycott or at least protest seems likely, which gives the government just enough reason to not renew the commissions at the end of their current deadline.

Following the merging of the CPN-Maoist with the CPN-UML to form a majority government, the future of the TJ commissions looks even bleaker due to the conflict of interest regarding the Maoists' heavy involvement during the conflict. This does not bode well for independence, impartiality, or even the continuation and support, monetary or otherwise, of the commissions.

²⁸ No appointments have been made as of writing on September 2019.

The fear of those individuals, especially political and social elites, who committed or ordered others to commit serious crimes during the civil war has now moved from temporary TJ mechanisms to permanent constitutional watchdog in the form of amending the NHRC Act, 2012. The amended bill would give the Attorney General the power to prosecute cases and, as the government's own legal counsel, the chances of that might be minimal. Already, according to the NHRC's annual report for 2017-18, only 12.5 percent of the recommendations have been fully implemented, and almost 40 percent are "under consideration" where the unimplemented recommendations pertained to human rights violations (Singh, 2019, p. 4). The amended act would destabilize the independence and autonomy of the organization, thus going against the Paris Principle²⁹ when only recently Nepal had filed for candidature for UNHRC membership. Anup Raj Sharma, current chairperson of the NHRC, makes the claim that the new bill would destabilize TJ mechanisms as well (Kamat & Nepal, 2019, p. 3). He recalls that NHRC had been investigating human rights violations since 2000, and one particular case brings the issue to light. The NHRC had investigated the disappearance of five individuals in Janakpur, who were eventually found dead. After exhuming the bodies and confirming their identity, the recommendation to prosecute the perpetrators and accomplices was not initiated because they happened to be the Chief District Officer,³⁰ armed Police Force officials, Army officials, and other government officials. Without having executive powers, the NHRC can only investigate and recommend, but it is up to the government to

²⁹ The Paris Principle lays out criteria that national human rights institutions (NHRIs) must meet in order to be held up to international standards as laid out by the United Nations General Assembly in 1993. For more information see <https://nhri.ohchr.org/EN/AboutUs/Pages/ParisPrinciples.aspx>

³⁰ Administrative powers akin to a governor of a state in the U.S.A.

act. With the Attorney General in charge, there might not even be any investigation. While conflict-era cases are already ongoing, there is no arrangement in the current TJ Act for any facilitation of transfer which can void a decision with further appeal. The constant theme of political parties avoiding any accountability for past actions, or even acknowledging it given the circumstances, creates bad faith; is this indeed trying to create a conducive environment for reconciliation? The tardiness in choosing TJ commission members and the attempt to change the NHRC Act makes it clear that the political establishment, mainly those who were involved heavily in the civil war, are making sure that the mantra of “forgive and forget” resonates through any means necessary.

With the current two-thirds absolute majority enjoyed by the government, there have been multiple attempts to misuse the power for restricting press freedom and controlling social media/internet access.³¹ The government is now looking to incorporate the autonomous constitutional organ of NHRC within the confines of the central government, specifically the office of the Attorney General (Basnet, 2019). Even though the constitution clearly states that the NHRC should have independence in decision-making and receive funds from the government in order to carry out its mandate, the timing of the proposal of the bill seems suspicious. With the TJ mechanisms in disarray, the mandate to address the conflict era cases in such a situation could possibly fall into the hands of NHRC, even though it has already been investigating cases without any power to act. If that were to happen after the bill is passed, the government would have the power to cherry-pick not only what cases to work on, but also who to reprimand, if

³¹ See Chapter Six for more details on how the government is looking to consolidate maximum powers to the PM’s office.

anyone at all. All regional and sub-regional offices of the branch could be closed as well, not only taking away the rights of the people to address their grievances but also resulting, intentionally or not, in a return to the old centralized model of state power

WHAT WENT WRONG WITH NEPAL'S TJ MECHANISMS?

Never have I been more convinced of the destructive effects of the yawning gap between the international expert/policy/political/donor discourse on #transitionaljustice and the reality and discourse among the people these concepts are supposed to serve. Self-serving and relevant to small cabal of professionals and bureaucrats, this foggy discourse, burdened by donor agendas and obscure language, enables opportunists to frame the debate, politicize and ultimately neuter efforts at justice, as they portrayed as rootless and divorced from the reality, culture and history of the communities struggling with the consequences of injustice. More often than not this leads to effort being rejected by those that need it most, regardless of how helpful it could have been.

- Refik Hodzic, Director of Communications, ICTJ 2011-2017
Source: <https://twitter.com/ledenik1/status/1098556215548817408>

First and foremost, the political parties did not adhere to the terms of when the commissions were to be formed and under what basis, as they had agreed to when they signed the Comprehensive Peace Accord (CPA). The CPA signed on November 22, 2006 between the Nepal Government and Communist Party of Nepal (Maoist) effectively ended the civil war and laid out plans for major changes that were to be made in the coming years. The promises laid out in the agreement led to, among other achievements, the establishment of the Constitutional Assembly that saw the promulgation of the new constitution.³² However, many of the promises that pertained to the disappeared and victims of the civil war have either been watered down or completely ignored. Some of

³² Albeit the new constitution was not seen as the progressive document it was meant to be and there were violent reprisals because of that, specifically in the Terai region. See next chapter.

the clauses that pertain directly to TJ issues as outlined in the CPA between Government Of Nepal and the CPN (Maoist) (2006) are as follows:

Clause 5.2.3. Both sides agree to make public within 60 days of signing of the agreement information about the real name, caste and address of the people 'disappeared' or killed during war and to inform the family about it

Clause 5.2.4. Both sides agree to form a National Peace and Rehabilitation Commission to establish peace in the society by normalizing adverse situation generated by armed conflict and to carry out relief for and rehabilitate people victimized and displaced by war, and to carry forward the tasks related to this through the Commission.

Clause 5.2.5. Both sides agree to set up a high-level Truth and Reconciliation Commission through mutual agreement in order to investigate truth about people seriously violating human rights and involved in crimes against humanity, and to create an environment of reconciliations in the society

Clause 5.2.9. Both sides agree to solve problems created in the above context on the basis of mutual agreement and to take responsibility at the individual and collective manner in the task of creating appropriate environment for normalizing relations and reconciliation and ensure implementation with the help of all political parties, civil society and local organizations.

Clause 7.1.3. Both sides express the commitment that impartial investigation and action would be carried according to law against people responsible creating obstructions to the exercise of the rights envisaged in the letter of agreement and ensure that impunity will not be tolerated. Apart from this, they also ensure the right of the victims of conflict and torture and the family of disappeared to obtain relief (pp. 8–9)

As evident almost none of the clauses relating to Transitional Justice were carried out as stated. One of the main reasons the stipulations of the CPA was not fulfilled was because of a lack of any oversight body, national or international, to ensure the points were ticked off accordingly. In addition, multiple hurdles exist before the government can be held accountable to the promises that were made:

Nepal is not party to the International Convention for the Protection of All Persons from Enforced Disappearance (2006), the Rome Statute of the International Criminal Court (1998), nor the Additional Protocols to the Geneva Conventions. There have been calls for Nepal to ratify the Rome Statute of the ICC but, despite some actions in parliament, there has been little progress towards ratification...[S]erious violations of human rights and humanitarian law are not specifically criminalized in Nepal (including torture and enforced

disappearances³³) and gaps also exist in relation to procedural laws (Bisset, 2014, p. 10).

The way in which the conflict ended was also another reason for the lack of fulfillment of promises made in the CPA. With a negotiated agreement and without a clear victor, the Maoists and the SPA carried almost the same amount of violent baggage. Not adhering to the spirit and letter of the agreement provided inculpability to the parties and saw avoidance of any form of accountability. The notion of victim-centric was completely stripped off, replaced by political consensus building and political cronyism, mostly to avoid the looming threat of persecution. The dichotomy between law and politics holds steadfast in this case, where with the politicization of the process – the political parties who themselves have the authority to change the law – do not seem to be in a rush to let go of the reigns of the TJ process. On the other end of this dichotomy are mostly human-rights groups³⁴ who believe in the absolute rule of the law and the need to hold perpetrators accountable. These two opposing groups seemed to have overlooked the role of the TJ mechanisms as not only to prosecute, but also to provide an avenue for healing and finding the truth, individually and on a larger societal level. The two mechanisms of TRC and CIEDP were initiated to provide closure to those who

³³ Enforced disappearance of individuals was criminalized with the promulgation of the Nepal Civil and Criminal Code (2017). However, “it falls far short of Nepal’s international obligations and the Convention on the Protection of All Persons from Enforced Disappearance (CED) in several respects, including: the definition of enforced disappearance inadequately addresses superior command responsibility for enforced disappearances; it does not expressly make the prohibition against enforced disappearance absolute; the provisions on penalty for enforced disappearance are inconsistent with international standards; and the bill, if enacted, will only be effective from August 2018, with no retrospective effect” (International Commission of Jurists, 2017, p. 34). Similarly, the criminal Code contains provisions criminalizing torture and other ill-treatment, with a maximum of five years’ imprisonment, yet “a separate anti-torture bill, which remained pending in Parliament, fell far short of international legal requirements” (Amnesty International, 2018)

³⁴ There are individuals who believe in the same cause, but as I point out later on, the percentage of victims who only want prosecution, or even prioritize it, is minimal.

desperately needed it, as well as to serve as a means of public discourse to address the past so as not to repeat it.

According to Ram Kumar Bhandari, a prominent TJ expert and a victim of the civil war whose father was disappeared in 2001,

Nepal's human rights movement is political. Human rights actors look more like allies of political parties. They often raise the issues of civil and political rights. But the root cause of the conflict are structural violence and social, economic and cultural discrimination. The human rights movement never adopted a transformative agenda. The talks about international standards and universality are detached from local realities. The international human rights movement also appears to be a part of the problem. It does not offer solution, debate, partnership, dialogue, action and transformation. The issues of the Madhesis, the Janajatis, the squatters, the urban poor and the marginalised never appear in the public discourse. This has further eroded socio-political cohesion (Rai, 2017, p. 4)

Bhandari's comments go back to the issue of pure legalism in the TJ process which restricts it from achieving more not just for the individuals involved but for the society as whole. He also makes the claim that a victim-centric approach, which might have allowed for amnesties, was rejected by the international and donor communities from the onset, resulting in constant disagreement with the TJ trajectory.

This falls into one of the four TJ dichotomies, or paradigms of "local/international"; the other three are law/politics, peace/justice and victims/perpetrators, as described by Girelli (2017, p. 295). The government was very reluctant to hear any advice from the international community on how to help with the process unless it served its own interest. Armed with the shield of 'autonomy' and 'self-determination,' valid and crucial steps such as complying with Supreme Court rulings, let alone international standards, continue to be ignored.

To make matters worse, there has also emerged in-fighting among the victims regarding the implementation of a "high-level mechanism" within the recently revived

commissions. Previous prominent members from Conflict Victims Common Platform (CVCP), who oppose the high-level commission, have created their own organization, Conflict Victims' National Alliance for Justice (CVNAJ) / Conflict Victims National Network. Dissenters, including Bhandari, argue that a political mechanism would not have the required credibility, especially when victims are not adequately engaged in the commissions' structure and deliberations (Rai, 2019a). Regardless of the final outcome, if the victims and survivors are not consulted and/or involved in the process, then the validity and longevity of the result will always be contested. This unintentional or intentional denial of victims' adequate agency and power in influencing the process, and subsequently the outcomes of transitional justice mechanisms, creates further issues of legitimacy, no matter the output. This constant reiteration by many victim networks that the *process of TJ* is as important as the outcome itself should not be ignored. I believe there needs to be a fifth TJ paradigm of *process/output* added to the four listed by Girelli (2017), that of process in this case being tantamount to procedural justice. A recent study found that even though the outcome was of primary importance for civil parties in the Extraordinary Chambers in the Courts of Cambodia (ECCC), there were procedural factors that they marked in their evaluations as bearing influence on their assessment of the outcome. More specifically, impartiality, support of the UN (given the social context of their "lack of faith in domestic legal system" which mirrors the case in Nepal), and "being kept informed, respect, expediency, and representation" were central factors (Killean, 2016, p. 35). Killean (2016) also argues that providing a sense of support and security throughout their involvement could allow for an even greater appreciation of procedural justice. Unfortunately, in Nepal, with a limited legal mandate and not enough

protection for the victims, it is hard to build and effectively maintain trust, especially with perpetrators in positions of social and financial power where they can easily intimidate victims. There was never a rigid mechanism to ensure the safety of the people who would come forward to tell their stories, or even attempt to get retribution through legal channels, TJ or otherwise. Under the right circumstances and intentions, this paradigm can be mutually inclusive and does not have to be an either/or option. After the arduous road towards fulfilling promises at this point, the focus should be on getting the process right, which in my opinion should be a complete victim-centric model. Channeling the focus on process could indelibly lead to a shift away from the outcome, and lead to a successful conclusion, no matter what that might be.

Process-wise, there have been grassroots efforts to address the wounds of the civil war with projects on community dialogue and mediation, reintegrating past combatants into society, and providing economic and psychological resources to both ex-combatants and any affected populace. However, there have been few to no initiatives for addressing grievances on a national level that incorporate the needs of the victims. With analysis of past TJ experiences³⁵ providing sufficient evidence that “trials and amnesties together contribute to improvements in human rights and democracy, with or without truth commissions” (Olsen, Payne, & Reiter, 2010, p. 997), the possibility of trials occurring, and more so the perpetrators being held accountable, seems highly improbable in the current political climate. Even the simple act of truth telling and creating a collective

³⁵ Using POLITY IV’S Regime Transition Variable, the authors calculated the change in democratic score of countries that went through a TJ process between 1970-2007 and comprising any variation or single mechanism of trials, truth commissions, and amnesties.

memory of the events that occurred can be mired or even disparaged in the politicization of the truth commissions or similar platforms created by the state (Brants & Klep, 2013).

LACK OF VICTIM VOICES

Robins (2012) points out in the Nepali context, the term ‘victim-centric’ is under-conceptualized, resulting in a situation where the people who bore the brunt of trauma are not consulted or even thought about when creating and implementing TJ mechanisms. Even within the framework of human rights that often comes with TJ, the distinction between theory and practice is very stark. Robins argues that TJ continues to be “elite-led and [marginalizes] victims and their agendas, and [is] dominated by a narrow legalism that neglects the priorities of the victims” (p. 6). He particularly focuses his research on the Tharus of Bardiya, a distinct group of people who, due to decades of social exclusion and land policy, have little to no influence in politics. Many have only recently been freed from indentured servitude and, in a cruel irony, are agriculturalists who do not own land for farming anymore. With distinct social and cultural uniqueness, they do not fit into the ‘Nepali’ mold either through language or cultural practices and are still plagued by the *Kamaiya*³⁶ practice, which even though was officially abolished in 2000 still exists in various forms throughout the country. Hence, during the civil war, the Maoists actively, albeit not always successfully, tried to recruit them. Nonetheless the state always held suspicions against the Tharu community, with or without any evidence, which led to increased violence by the state against the community. Robins (2012) summarizes the issue by stating

³⁶ System of indentured servitude in Nepal, almost exclusively victimizing the Tharu communities

The history of dispossession among the Tharu of Bardiya made them receptive to Maoist commitments to ethnic autonomy and land reform and the CPN-M found a pool of support in the Tharu community. In districts like Bardiya, the greatest issue the population faced was that of land and landlessness. As the CPN-M gained effective control of rural areas, they tried to be seen to be addressing such issues (p. 12).

One of the districts with the greatest number of disappeared, especially by the state, was Bardiya³⁷. Even though the Tharus constitute only 52 percent of the population, 80 percent of the disappeared were from the Tharu community. The disappearances had less to do with actual involvement with the Maoist struggle but instead, in many instances, was an offshoot of “struggle over land” (Robins, 2012, p. 13). Using existing legal channels to address civil-era disputes has further victimized some families where previous landowners are being assisted by NGOs to “regain their property, following Maoist seizure and redistribution of their land. This appears to local people as simply a political attempt on behalf of elites to return Nepal to a status quo that the conflict radically challenged” (Robins, 2012, p.18). Any push by well-funded NGOs that focus on legal justice over everything else also leads to a lack of funding of organizations like Conflict Victim’s Committee (CVC) who not only have a dearth of connections but are not as versed in ‘human rights speak’, or even want to exclusively pursue legal actions. CVC’s funding was rescinded until it changed its scope from just the disappeared to all victims of the conflict (Robins, 2012, p. 24). This highlights the need to move away from normative ideologies of rights without addressing social inequality. A rights discourse, more often than not, will always be forwarded by people and organizations in power and holding agency.

³⁷ See Appendix B for map of districts with the number of enquiries from families of the disappeared.

Robins (2009), working closely with CVC in a very early study of the needs of the families of the missing in Nepal, criticizes studies done by ICTJ and Advocacy Forum for taking an exclusively judicial approach and also for not including enough women or indigenous victims as part of their sampling. Even though only three percent of respondents in studies carried out by the two organizations favored prosecutorial justice, the organizations were heavy-handed in asking for prosecutions rather than addressing and providing the needs of victims as they themselves had elucidated. Using victims as centerpieces in order to raise funds and advocate causes for something completely different than what victims actually want has become prevalent in Nepal and constitutes a top-down approach that ignores the needs of the victims. The research carried out by Robins, using Participatory Action Research (PAR),³⁸ with close cooperation with Conflict Victim's Committee (CVC), concluded that when excluding the organizational leadership, most of the victims' priorities were finding the truth and receiving economic support due to loss of a "breadwinner."³⁹ There was a definite emphasis on needs rather than human rights. Many of the respondents mentioned that in terms of prosecution they would rather see the "informers"⁴⁰ be prosecuted than the actual persons who carried out the disappearance.

³⁸ See next chapter for how this method, in conjunction with Restorative Justice principles, can lead to a better victim-centric process.

³⁹ In this case the "breadwinner" would always be a male. In the case of a widower they would not be considered as a victim because due to societal norms they could marry, and did not have to bear the shame and often time family abuse widows have to persevere due to the societal norms (Selim, 2017).

⁴⁰ Informers were people who would either work together with security or Maoist forces to capture someone or work with them to aid in the disappearance.

The study carried out by CVC highlighted the issue of internal “white savior complex” within national and also international human rights organizations, where the human rights discourse is propelled even when it does not reflect the victims’ actual needs. This lack of awareness is often guided by the notion that sometimes the victims do not know what they want. Similarly, Kurzea et al., (2015) add the failure of local level legal aid and rights discourse in providing victims “need-oriented support.” The authors make a salient point that often “local” is a derivative of the state giving little focus on non-state and non-institutional actors who are in abundance in any TJ process. Programs supported by institutions such as the Commission on Legal Empowerment of the Poor (CLEP) have failed to bridge the gap between theory and practice where “a top-down approach that aims at convincing national leaders to implement legal empowerment programs for the poor, instead of helping the underprivileged and marginalized to create their own agenda” (p. 263) has seen a failure in terms of attaining goals set out by CLEP. The authors cut across multiple forms of TJ processes with qualitative research from Nepal, Bosnia-Herzegovina and Tunisia to show the cross-cutting applicability of the issues raised and the solutions presented. In the case of Nepal, the solution for a majority of victim communities – depending primarily on social and financial standing – is economic-centered rather than legal: “redistribution of assets—and most importantly that of land— remains entirely absent from rights discourse in Nepal, precisely because it is elite” (Kurzea et al., 2015, p. 266). As made abundantly clear by researchers like Simon Robins who work closely with conflict-era victims and victim-organizations, legal empowerment should follow the primary need of addressing the social, economic and political empowerment that TJ should follow. Nevertheless, TJ in Nepal, due to its

lengthy and continuing journey, is enmeshed with the issue of discrimination within the intensity and perception of victim voices, in addition to the lack of them.

DISCREPANCY WITHIN AND OF VICTIMS

As was apparent in the preceding section, the lack of victim voices was not as a whole but relegated to select victims based on economic standing, geographic location and backing by NGOs. More than likely, the recent split within victim communities based on what they would like to see as the outcome has given the government even more reason to ignore their common appeal of being involved within the process. In order to fully realize the missing ‘victim-centric approach’ to TJ, it is also crucial to analyze who is considered a “victim”, and in the case of Nepal, who has been excluded.

Selim (2017) gives a detailed analysis of victimhood and the relation of a predominantly false victim/perpetrator binary within TJ literature. According to her, this is the first ever individual case study done for Nepal. There has been similar work conducted focusing on rights discourse and its interpretation of victimhood elsewhere in TJ (K. McEvoy & McConnachie, 2013) including cross studies of public support for reactions against perpetrators in Guatemala and Northern Ireland (Dyrstad & Binningsbø, 2019).⁴¹ Selim also provides a detailed and insightful account of the development of

⁴¹ They reach the conclusion through statistical analysis (N=2507) that there is more demand for punishing insurgents in Nepal mostly because most of their respondents were either from the NC or UML party, both part of the government during the civil war. Also of interest is that “High castes in the lowlands (Terai), Brahmin and Chhetri, are significantly less in favor of punishment for government perpetrators, while Hill Dalits, reportedly the poorest caste in our sample, are significantly more in favor. Similarly, the mainly prosperous, Kathmandu-based Newar caste is significantly more in favor of punishment for perpetrators on the insurgent side” (Dyrstad & Binningsbø, 2019, p. 174). This fits the narrative of government forces’ excessive use of force in the region, and the seclusion from violence in the capital and media bias along with the party affiliations.

victims groups from 1999 to 2012. In addition to some of the distinctions within victims⁴², I have laid out in the preceding section, the victims were divided based on loved ones killed by the state or the Maoists, victims who had family members disappeared, and also their own political affiliations. The CVCP was formed in 2014 under the auspices of the UN to bring together victims from different backgrounds to support each other and provide a platform to air their grievances and be closer to the TJ debate. However, the overt influence of human rights institutions such as ICRC and Advocacy Forum, whom she refers to as “TJ ‘brokers’ – those who operationalize TJ on the ground”, and ICTJ, whom she refers as “TJ ‘experts’ – those who produce TJ discourse and knowledge,”⁴³ is seen by many as the main reason for division within the victim community based on what they can get from the institutions (p. 281). Selim, through her interviews, quickly discredits the victim/perpetrator binary and shows the fluidity and complexity of the situation. Starting from the term itself, she emphasizes that “victim” is associated with the idea of support from the state, monetary or otherwise, and there have been instances where organizations have changed their names to establish the need for support. On the other hand, she also introduces a group entitled “conflict-affected” who either had been indirectly affected by the war, or even if they were directly affected don’t identify themselves as victims or survivors. Similarly, for those who were killed in the conflict, next of kin would be compensated three times more if the deceased was identified as a “martyr” as compared to a “victim”. In addition to the monetary

⁴² I use victims and victims’ group interchangeably from now onwards

⁴³ The other two main actors she identifies in the TJ process are TJ implementers – those who implement TJ on the ground – and victims.

benefits, Selim notes that Maoist combatants killed were more likely to be called a “martyr” as the politburo wanted to “elevate their people [and] glorify their involvement in the war” (p. 282). Ex-combatants however were not seen as “victims” in many cases⁴⁴, even though they would contend that they suffered through a lack of opportunity while they were fighting. This sentiment was even more relevant for disqualified ex-combatants, who did not even receive monetary compensation, but were also shunned from society for their involvement in the war.

A total of 4008 combatants were deemed disqualified, where 1035 were recruited after the peace process and 2973 were child soldiers (Republica, 2019). Discharged People's Liberation Army-Nepal (DPLAN) had the same issues of state neglect and wanted some of the same resolution of livelihood support, technical training of sustaining themselves, and recognition as other official “victims”. Yet depending on different perspective, these ex-combatants could be considered by others as ‘perpetrators’ for their involvement in the war, while they might consider themselves ‘victims’ with legitimate grievances. TRC, whose mandate is to validate victimhood and provide adequate help, would not deem the 4008 combatants as “victims”, but those ex-combatants would beg to differ. Selim successfully demonstrates how even within a seemingly homogenous group there exists different perceptions, both inward and outward, depending on circumstances based on age, education, skills, location, knowledge of TJ, and the fatigue of waiting for answers and help. Though their need varies wildly, most of it is still relegated to non-prosecutorial aspirations.

⁴⁴ Some would not even be allowed to attend events and training for support organized by human rights organization

TJ has always been a politicized process, but the historical internal politics that intervene are what makes the TJ process detrimental to the victims' needs. The role of TJ 'brokers' and even TJ 'experts' in using their resources to influence their own needs, while actively discouraging bringing together victims from different 'sides' has definitely been an impediment to the success of TJ. Also, with the TJ process going on for 10 years, it might appear as a constant source of revenue to groups and organizations, which gives them personal insidious reason to continue sabotaging the process for as long as possible. These are just some of the issues with which the victims have to come to terms if they want to see any tangible results, when they themselves do not have the agency to advocate for themselves. The needs of victims vary depending on what they want out of the process, and that should not be changed for solidarity. Needs, as long as they are genuine, should be attempted to be met through TJ mechanisms. What needs to change is how victims interact amongst themselves. They should not to be swayed by TJ 'experts', 'brokers', or 'implementers' who might have a different personal or hidden agenda outside of the TJ process. Given the myriad of struggles, there is a possibility of horizontal issues arising within a victims' group and a rise of internal power struggle with a clear distinction between "elite" and "marginalized" victims (Sajjad, 2015, p. 13). There needs to be an understanding that the victims' group is a microcosm reflection of the inequalities that persist beyond the scope of TJ in Nepali society. This should be a motivation and a lesson to strive for change that not only benefits the individual but can be used as a 'bottom-up' approach to address issues within Nepali society after the conclusion of the TJ process. At this point of constant government stalling and

indifference, even though victims cannot come together to demand the same output, they should unite to ask for the same fair process to begin with.

CHAPTER VI

OTHER ISSUES TO (RE)CONSIDER

The Nepali civil war, albeit violent, was successful in bringing the plight of the numerous disadvantaged groups into the forefront. However, atrocities committed by both the state and the then-rebels have yet to be fully accounted for. In the name of nation-building and moving forward, both sides have failed to take responsibility for their actions and the process of reconciliation, and thus resolution, has stagnated. The CPA clearly stated that both sides would within 60 days reveal all information regarding people killed and disappeared. The same promise was reiterated during the Seven-Point Deal signed between the then-major three parties and the Madheshi alliance in 2011. In this chapter I highlight social and political issues yet to be fully addressed that exacerbate the resentments of various social and political groups within the country that might lead to a resurgence of violence. The ever-present structural issues within Nepali society mixed with the growing frustration regarding the TJ process can create a ripe environment for escalation of grievances, which eventually can lead to more direct violence.

The lack of action, let alone any form of results, sets a bad precedent for disadvantaged individuals and groups who feel left out of the overarching system, and who might consider violence as an efficient method for meeting their human needs. This precursor for violence is further exacerbated by the apparent weakness of the rule of law in the country, where any political group with the threat of violence can bring the country to a standstill with their *bandhs*. Political parties created the impetus of leveraging violence as a means of being invited to the negotiating table. Whereas the resurgence of

direct violence is increasing with the avoidance of important issues by the government, the ongoing structural violence within Nepali society does not seem to be dissipating anytime soon. Structural violence refers to “the institutional forces that create systems of inequity and injustice, often denying individuals and groups fundamental need fulfillment” (Tint & Zinkin, 2014, p. 165). Even though the history of structural violence in Nepal has been embedded into the social fabric for centuries, it has been more apparent in the eyes of the populace post-conflict and with notable events such as the *Madhesh Andolan*,⁴⁵ the 2015 earthquake, citizenship and gender rights, and the Indian blockade. The disinterest of the government in properly addressing the needs of conflict victims and their families in a timely manner constitutes the addition of more structural violence within Nepali society. In this chapter I briefly highlight some of the existing issues, some pre and other post-conflict, that will need to be addressed even after the completion of the TJ process. There are multiple intersections between TJ victims and the victims associated with these problems, either directly or indirectly. Thus, if TJ mechanisms are to be used as a springboard for a larger positive state transformation instead of just a transition, these issues need to be addressed simultaneously.

CORRUPTION AND IMPUNITY

The rampant corruption in Nepal has been described as a “kleptocratic network” constructed of expansive horizontal linkages among multiple, shifting partners, and providing impunity and benefits in exchange for illicit funds (Niti Foundation, 2019).

⁴⁵ Political and social struggle of the people in the *Madhesh* region to amend the constitution regarding discriminatory citizenship clauses, providing proportional representation, and providing safety for the people in the region.

Between 2006 and 2014 through the Ministry of Peace and Reconciliation, the government disbursed NPR 5,246,854,000 (Approximately USD \$137 million) under the “relief and financial support” category, a precursor to the TJ process. However, “no government since 2006 has tried to systematize welfare payments” and each incoming government has discretionary powers in allocating and distributing funds, which would always be in cash. Analysts have posited this is so “because endlessly expanding the list of conflict victims has enabled parties to distribute state funds to their supporters” (Adhikari, Gautam, Pudasainin, & Sharma, 2014, p. 32). Whereas previously political interference was mostly relegated to financial discrepancies, with the installation of TRC and CIEDP political interference has shifted to avoid any culpability of past-crimes. There has been minimal political consensus on a myriad of issues post-civil war, yet there is a tacit agreement between any governing parties to ignore court orders, often mandated from the Supreme Court, in regard to investigations, prosecutions, and convictions of human rights abuses. Similarly, the appointment of personnel and committee members in TRC and CIEDP based on political affiliations rather than expertise and victims’ need has given the whole process an air of political manipulation rather than problem-solving.

As per the maxim of consensus and maintaining power at any cost, after the historic elections the ruling Communist Party of Nepal (United Marxist Leninist) (CPN-UML) and Communist Party of Nepal (Maoist Centre) announced their unification as the Nepal Communist Party - CPN-UML. They now have a two-thirds majority and can pass almost any bills or ordinances without much pushback from a weak opposition mostly made up of the Nepali Congress. Many ex-cadres who gave sacrificed for the cause now

believe that “[their] leaders bartered [their] sacrifices for power in *Singha Durbar*.⁴⁶ [Leaders] had no concern for how we lost our happiness, our limbs and our family members”(Bibhas, 2018, p. 1) Comrade Khukuri, who made the comment, considers herself a “third generation” Maoist who never got to enjoy any of the spoils of victory, and who still struggle to reintegrate into the society and the everchanging Maoist political party. Many “third generation” Maoists have lost hope in that the Maoist leaders have lost moral ground, and the commitments and promises made to recruits to carry out the decade-long conflict was all in vain. This resentment held by the former combatants, who most likely were not qualified for integration, can either be channeled into the TJ process or else it will be easy for them to pick up weapons when all hope is lost again.

Multiple de-jure and de-facto immunity provisions have been afforded to numerous governmental officials and politicians in power, in addition to “powers of the executive to withdraw criminal charges, suspend, commute or remit a sentence and to grant pardon” (International Commission of Jurists, 2013, p. 5). Such immunities afforded to the Army and other policing bodies creates an environment rife with lack of accountability. This issue has been widely known and documented (Bhattarai, 2010; A. Adhikari et al., 2014). Yet when the Supreme Court takes the reign to address the issue by forcing police, in a highly publicized case, to arrest Maoist politician Bal Krishna Dhungel, who was convicted in 2010 of a murder in 1998, he gets a pardon from the President at the request of the government, thus only serving one year of his life sentence of 25 years (Narayan, 2019, p. 1001). If conflict era cases can easily be wiped away, then any hope for TJ to work, prosecutions needs to be ironclad. To date, the case of Dekendra

⁴⁶ Office of the Prime Minister and housing other government offices.

Thapa's killing is the only conflict-era human rights violation case where the guilty were tried and served their full sentence (A. Adhikari, 2018).

The symbiosis of the two intermingling issues is encapsulated by the news of the graft charges against a commissioner, Pathak, of the Commission for Investigation of Abuse of Authority (CIAA) in 2019. Pathak's actions were already known to the Prime Minister and while headway to impeach and charge him was undergoing, Pathak resigned. Even with the knowledge of the eventual impeachment and the crimes committed, his resignation was accepted, which allowed him to leave the position with no repercussions. Now it is very unlikely that he will face any repercussions and instead he is entitled to lifelong state benefits as a former high-level government employee (Shrestha, 2019).

FEDERALISM AND IDENTITY ISSUES

The *Terai* region, home to the majority of population of Madhesis and Tharus, has been a hotbed of violence due to internal political issues based on valid demands for (ethnic) identity, autonomy and federalism post-civil war. Between 2007 and 2012, more than 1,600 people were killed (The Asia Foundation, 2017, p. 120). The Maoists started their revolution with the promise of providing minority rights and equal opportunities. They attracted Madhesis and Tharus not only "because of their fight to end discrimination and give all languages equal status, but also by promising to create autonomous Tharuwan and Madhesh provinces in a future federal state" (Strasheim, 2017, p. 9). The Madheshi *Andolan* (protest) started erupted in 2007 when the promise seemed to be broken in the interim Constitution. This led to Maoist cadres and activists of

the Madhesi People's Rights Forum (MPRF) clashing, which resulted resulting in the deaths of thirty people. Strasheim (2017) claims "protestors' perception that the constitutional and institutional reform processes were squarely dominated by elite politicians in Kathmandu and meant to serve their interests, while marginalized groups were not invited to partake in decision-making" (p. 8). This demonstrates as well how political actors need to focus as much on getting the Process right rather than just the Outcome. If the marginalized groups had seen the process as being fair and inclusive even if the outcome was not as planned, violence could have been avoided. The contentious issue of identity let the first CA dissolve, and the second CA was faring no better when the earthquake of 2015 struck. Given the poor and insufficient response to the great earthquake, it was easily assumed that the signing of the 16-point agreement between the ruling NC-UML and the opposition Maoist-Madheshi alliance to pave the way for the promulgation of a new constitution was more of a smokescreen than an honest attempt to address important national issues, one of which was the establishment of an ethnic-based federal system. "[T]he Maoists entered into a compromise and accepted geography-based federalism as promoted by the Nepali Congress and the UML. The constitution was endorsed by 537 of the 598 Constituent Assembly members. Of the 61 members who boycotted the vote, 58 belonged to Madhesi parties"(Strasheim, 2017, p. 7). What followed was more violence, deaths, and a four-month long blockade along major entry ports with the Indian border that was implicitly supported by the Indian government.

The Tharu specifically were targeted by the state apparatus during the civil war, and the highest number of disappearances occurred in Bardiya district, which falls in the

Madhesh region. Given that the majority of Army personnel belong to higher castes, the war-era victimization was merely a continuation of the systemic and intentional violation of the community's rights for almost a century. Billingsley (2017) points out a watershed moment in Nepali history leading to a systematic disempowerment of the Tharu population that sees no sign of abating:

In the 1950s, with the encouragement of the leaders of the Nepali government and funded by international aid, the Malaria Eradication Program was implemented in the Terai. Following this program, 'high'-caste Nepalis from the hills were encouraged to move into the Terai, which ultimately resulted in the loss of land for members of the Tharu community. Some 'high'-caste migrants exploited the existing kamaiya labor system, resulting in extended bonded labor practices, increased indebtedness and marginalization for members from the Tharu community. Tharu resistance to such labor practices was curtailed by violence perpetrated by landlords and the police, and, regarding the situation in Dang district, a report issued by a member of the Land Reform Commission in 1954 argued 'the Government Offices meant for providing Justice take the side of the rich people and thus encourage further suppression of the poor (pp 74-75)

Prominent Madhesh leader and a long-time proponent of secession C. K. Raut, who had been leading a non-violent movement to form an independent Madhesh, dropped his aspirations in 2019 as well. He signed an agreement with the government, some say under duress while he was in prison, and formed his own group the *Janamat* (Referendum) Party (Qazi, 2019). Meanwhile, another uprising based on political identity is brewing with the actions of Netra Bikram Chand "Biplab" and his faction of the Communist Party of Nepal (CPN), the remaining radical wing of the Maoist party. Biplab has denounced both the constitutional elections and the 2017 national elections, as well as the current federal system. Even though his party has not made public their ideologies that could help them restart a revolution, what he does have is increasing people's resentment towards the old Maoist party for not fulfilling their promises. Even more discontent within the population could emerge from a failed TJ process. There has

been some public support for Biplab's party in spite of the announcement that the party already has a militant wing in training. This could have been a reason why the government was quick to ban the party and denounce its actions, which includes a couple of deaths from deliberate bomb explosions (Rai, 2019b). The action of the government to not bring Biplab to the negotiation table, maybe because of his past or present political affiliation, as they did with Raut might spell trouble if the issue is not addressed.

POWER HUNGRY CENTRAL STATE VERSUS FEDERALISM

There have been countless debates (Hachhethu, 2014) and opinions (Karki & Edrisinha, 2014) on various models of federalism even before it was established. However, implementation of the idea has not been as successful. With more than a year of operating, four out of the seven provincial assemblies have yet to even decide on names and capital cities⁴⁷. There are already issues with intergovernmental conflicts between the three levels of local, state and federal, including infrastructure and ideological upgrade that needs to be conducted in order to transition from the old unitary model to the current decentralized one (Bhusal, 2019). Similarly, there are also those who see the issues of corruption and impunity increase seven fold in conjunction with the seven provinces (Paudel, 2019).

The federalism model might take time to get used to, but with the old unitary centralized form of governance already out of existence, bills that are being pushed through in a full majority government indicate that the PM does not want to restrict his

⁴⁷ See Appendix A for a map of the delineated provinces and districts.

powers anytime soon. The PM has already struck against his dissenters with the passing of the Information Technology Bill (The Kathmandu Post, 2019a) and Media Council Bill (The Kathmandu Post, 2019b) which severely restrict free speech, civil liberties, and ensures the involvement of government in the self-regulatory media council. There had been no consultations before the bills were passed. While bills made to protect the PM and his government from scrutiny are being passed quickly, other key bills have yet to be addressed in years. The Citizenship Bill, which has been in limbo for more than a year, has made it impossible for citizens to get their citizenship document required for many official documentations. Because of this delay, 5.4 million people aged 16 and above do not have any proof of citizenship (Yadav, 2019). However, the issue is not simply an incompetent bureaucracy; the citizenship bill delay stems from the highly-debated provisions of how citizenship is provided, naturalization or birth, and specifically the issue lies with passing down citizenship through mothers. This also relates back to the Madhesh issue where the majority of the people who are denied citizenship through their mothers are falsely accused of coming illegally through India just to get the citizenship (The Himalayan Times, 2019b). While sensitive issues are not being addressed, leading to marginalizing and, in many cases, even re-victimizing a sizeable portion of the population, the PM is instead trying to pass bills that would solidify his power or allow him to benefit with kickbacks. Among the bills the PM's office is hastily trying to pass are ones that would ensure any big projects worth Rs. 25 billion⁴⁸, initially proposed to be Rs. 50 billion, be handled by the PM's office (Pandey, 2019) and give the PM sole

⁴⁸ Approximately USD 221.5 Million

discretionary power to authorize the mobilization of the army without consulting any other member of the National Security Council (The Himalayan Times, 2019a).

CHAPTER VII

RESTORATIVE JUSTICE (RJ) and TJ

The current focus of delivering justice in Nepal's TJ process seems to pivot towards criminal prosecution. Although a valid demand, as I mentioned in previous chapters, this demand has in large been taken over by national and international organizations, sidelining other legitimate needs of the victims and survivors. The exclusive focus on criminal prosecution has started to emerge as one of the normative functions of TJ, yet this one-size-fits-all method does not consider other concerns and needs of the victims. The drawbacks of focusing on prosecutions as an end rather than a means to attain justice has extensively been discussed through multiple case-studies by Mani (2002), who contends that focusing exclusively on prosecutions not only has a possibility of exoneration of culprits due to a weak justice system, but that it also undermines a focus on socioeconomic and political issues. Those are almost always important underlying issues that need to be addressed in order to attain justice for victims. The emphasis on criminal justice or retributive justice focuses on punishing perpetrators while missing out on supporting the victims. In this chapter I explore the concept of Restorative Justice (RJ) that can be utilized in conjunction with TJ processes to provide the victims more agency in supporting their needs, which goes beyond trials and prosecutions.

RESTORATIVE JUSTICE (RJ)

The idea of Restorative Justice is considered by many to be much different than ‘retributive justice,’ commonly known as the traditional criminal justice system. The government in Nepal is looking to prosecute crimes according to the existent criminal justice system, which not only does not provide adequate reach of the crimes committed, but also does not recognize the gross violation of human rights that occurred⁴⁹. Howard Zehr’s (1990) seminal work on RJ provides a valuable critique of the punitive criminal justice system where the victim is often disregarded, emotionally and judicially, as soon as the offender is apprehended. Zehr presents his idea of addressing the “needs” and “roles” of the often-overlooked stakeholders (victims and community members) who he believes have crucial roles in attaining ‘justice’. Zehr ruminates on how the current conceptions and frameworks of justice, especially in regard to western law and the criminal justice system, seriously overlook the victim’s actual needs or the root causes of “crime” (which are often systemic), and even downplay their role in the justice process. Subsequently, the impersonal state judiciary, which deems itself the main victim, only helps to further alienate the original victim of the crime. Zehr’s description resembles how the TJ process has sidelined the victim communities in Nepal.

Restorative justice processes started in the 1970s as mediation between victims and offenders, such as the Victim Offender Reconciliation Program (VORP). The thematic issue was expanded in the 1990s to include communities and collaborative processes through “conferences” and “circles”, as well post-1990 apartheid in South Africa, where a restorative process was used as part of a larger transitional justice

⁴⁹ Also, as evident multiple times cases are just pulled off of the regular criminal justice system

schematics (Daly, 2002). Table 1 shows a simplistic view highlighting the main differences between Retributive and RJ processes. Retributive processes focus more on punishing rather than RJ's aim of addressing the issue holistically while involving the victim throughout the process.

Table 1: Difference in Views between Retributive Justice and RJ (Leonard, 2011, p. 32)

| <i>Retributive Justice</i> | <i>Restorative Justice</i> |
|--|---|
| <ul style="list-style-type: none"> • Crime is a violation of the law and the state | <ul style="list-style-type: none"> • Crime is a violation of people and relationships |
| <ul style="list-style-type: none"> • Violations create guilt | <ul style="list-style-type: none"> • Violations create obligations |
| <ul style="list-style-type: none"> • Justice requires the state to determine blame (guilt) and impose pain (punishment) | <ul style="list-style-type: none"> • Justice involves victims, offenders, and community members in an effort to put things right |
| Central Focus: Offenders get what they deserve | Central Focus: Victim needs and offender responsibility for repairing harm |
| Three Different Questions | |
| <i>Retributive Justice</i> | <i>Restorative Justice</i> |
| What laws have been broken? | Who has been hurt? |
| Who did it? | What are their needs? |
| What do they deserve? | Whose obligations are these? |

As is evident from the distinctions shown in Table 1, the current process and aspirations in Nepal seem akin to a retributive model proposed by many groups, which pushes away the participation of the victims and survivors and fails to meet their needs. There must be a confluence of these two processes for the outcome to be desirable not only for the victims and survivors, but for the entire Nepali society.

A CRITICAL LOOK INTO RJ

Zehr and Mika (1998) highlight the definition of RJ, as illustrated by Tony Marshall, as “a process where-by all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implication for the future” (p. 51). Zehr and Mika, however, point out the “seductiveness of his succinct definition”; a primary scrutiny RJ suffers from is the lack of a comprehensive and rigid definition that can clearly extrapolate its scope and functions. The theoretical ambiguity that often follows RJ discourages cohesive applicability to TJ schematics. The leeway that comes with a lack of definite structure might also lead to co-optation of the process by a group(s) or the state to unjustly use the process to achieve their own desired outcome. Therefore, in order to focus on the core ideals of RJ that are specific to the TJ process in Nepal, and expand upon the basic definition, I emphasize the explicit organizational definition of restorative justice provided by Zehr and Mika:

1. Crime is fundamentally a violation of people and interpersonal relationships
 - 1.1 Victims and the community have been harmed and are in need of restoration
 - 1.2 victims, offenders and the affected communities are the key stakeholders in justice.
2. Violations create obligations and liabilities
 - 2.1 Offenders’ obligations are to make things right as much as possible
 - 2.2 The community’s obligations are to victims and to offenders and for the general welfare of its members.
3. Restorative justice seeks to heal and put right the wrongs
 - 3.1 The needs of victims for information, validation, vindication, restitution, testimony, safety and support are the starting points of justice.
 - 3.2 The process of justice maximizes opportunities for exchange of information, participation, dialogue and mutual consent between victim and offender.
 - 3.3 The justice process belongs to the community
 - 3.4 Justice is mindful of the outcomes, intended and unintended, or its response to crime and victimization (pp. 51-53)

Before I dive deeper into how these themes relate to the TJ process in Nepal, it is imperative to investigate whether RJ is an abstract concept suited more for theoretical discussion, or if it can be used to create set guiding principles. Robinson and Hudson (2016) comprehensively analyze these issues, and in doing so have come up with a typology that aids in bridging the theoretical and practical divide. In their typology of the discipline, they conceive four distinct strands – reintegrative, psychotherapeutic, communitarian, and insurgent – that inform a transition to efficient practice based on where each strand emerges and ends⁵⁰.

The first strand of *Reintegration* focuses primarily on offenders and rebukes the ‘normative’ retribution model of punishment where offenders are punished rather than given the opportunity to rehabilitate. This model is often seen as more ‘offender-centric’ and thus exclusively using this methodology would not be conducive to meeting the needs of the victims. Robinson and Hudson (2016) further criticize this strand as being limited in scope and creating an undue burden on the victims to “forgive” their offenders for the victims themselves to regain autonomy.

The initial step in regaining autonomy is for RJ to facilitate “the transition from traumatic to the re-empowered” (p. 350), which falls within the second strand of *psychotherapeutic*, or healing, strand. However, the authors allude to shortfalls of this strand as well where individual re-empowerment could be antithetical to a common value, and either individually or as a group the justice could be equally harsh and/or unforgiving. Depending on the level of trauma, some victims might desire extreme needs akin to ‘an eye for an eye’, which could be very hard to attain. The quixotic TJ process in

⁵⁰ See Figure 5

Nepal drives home the fact that with every passing year without reconciliation the scars get deeper and harder to cure. Similarly, the scope in this strand can be limited because macro issues that could lead to revictimization are never addressed.

The third strand of *community* focuses on “four indigenous reclamations” that emphasizes maintaining community harmony through indigenous, traditional, or religious methods, eschewing the often ascribed “western” model. Among the five criticisms that the authors point out, the primary criticism that can be seen in the context of Nepal is the reifying of patriarchy in the decision making and even in the process. Also, the criticism that RJ can minimize victims of gender violence, in the case of Nepal including rape and sexual assault survivors, is also applicable to the current TJ mechanism. Additionally, the use of this thread for the Nepali context is especially problematic when the ‘bigger picture’ of moving forward overshadows individual concern and time-frame for grieving and reconciliation. Robinson and Hudson (2016) add

[Communitarian] RJ may artificially close off the space and time necessary for individual healing in the service of a larger community's need to "move on" from the past." Communitarian RJ, because it subsumes individual needs to those of social repair, may sacrifice the needs and temporalities of traumatized individuals in its haste to rebuild a larger community of care. (p. 359)

The final typology of *insurgency*, according to Robinson and Hudson (2016), needs to be “socially transformative” and should be able to realize “conflict ownership”, where it works towards “subvert[ing] existing [among others, judicial and structural] power paradigms” (p. 360). However, as wholesome as this sounds, it is the hardest to fully achieve. Yet, it needs to be done because “insurgency is also a needed check on the calcification of RJ theory and the institutionalization of RJ procedure. Insurgency

theorists continue to call needed attention to the internal paralysis and the often-self-reinforcing, circular loop of RJ theory and practice” (p. 364).

FOUR STRANDS OF RESTORATIVE JUSTICE

| Strand | Primary Focus | Scope | Associated Practices | Related Academic Disciplines |
|--------------------|------------------------------|-------|--|---|
| Reintegrative | Individual Offenders | Micro | Victim-Offender Conferencing/ Sentencing Circles/ Restorative Shaming | Social Work/ Sociology/Criminology |
| Psycho-therapeutic | Individual Survivors | Micro | Victim Advocacy/Victim Advocate Mediation/ Story-Telling | Psychology/ Psychotherapy |
| Communitarian | Communities of Meaning | Meso | Peacemaking Circles, Family-Group Conferences/Family-Group Decision Making, Community Conferencing | Anthropology/ Ethnic or Indigenous Studies |
| Insurgent | Unjust Sociopolitical Orders | Macro | Social Transformation | Development Studies/ Critical Theory/Critical Legal Theory/ Political Economy |

Figure 5: Four Strands of Restorative Justice (Robinson and Hudson, 2016, p. 369)

HYBRIDIZATION OF TRANSITIONAL AND RESTORATIVE JUSTICE

Even though a fairly new idea, the overlap between TJ and RJ has been considered by multiple academics and practitioners: theory-based work (O’Mahony & Doak, 2012; Clamp & Doak, 2012); multiple thematic issues with respect to child soldiers (Steinl, 2017); country specific for Bolivia (Pearson, 2017) and Sierra Leone (Nkansah, 2011). A common theme throughout most of the literature is that in cases

where the integration of RJ process within the existent TJ process emerges with a government-led mandate, there exists a specific issue of either failure or lack of substantial progress within the hybrid-model. Even though governments might allude to the RJ process as a means of reconciliation, due to a lack of desire and accountability the mechanisms created might not account for much at all. For example, in the case of the Colombian Peace Process, Pearson (2017) concludes that “preparing, designing and supporting restorative processes to reach active, collective accountability, restoration for victims and the reintegration of perpetrators have not yet been clearly mapped out and no particular national or regional entities have been charged with this responsibility” (p. 307). This highlights the crucial point that if RJ is to be incorporated within the TJ model, the first step is to give the majority of responsibility - from creating the process to making sure of its implementation - to the victims and survivors, with support as required, rather than continuing the status quo of government inefficacy and apathy.

As the current TJ structure stands, the role of the victims in the process has been minimal at best, and completely overlooked at worst. A special memorandum from the Office of the High Commissioner of UN Human Rights specifically points out the “lack of impartiality, independence, and transparency” for appointment of committee members in the TRC and CIEDP (*Joint Communication from Special Procedures. Re: OL NPL 1/2019*, 2019, p. 2). The report also highlights the lack of progress since the establishment of the two commissions in 2014 and criticizes the lack of consultation with victims and civil society in every step of the process so far. The international condemnation presented in the document focuses primarily on the amendment of the TRC 2014 Act. Incongruency with international norms and victims’ demands have still

not been amended, which includes “granting the TRC and the CIEDP mandate to recommend amnesties for perpetrators of gross violations of human rights and serious violations of international humanitarian law and to initiate reconciliation processes in the absence of a request by the victim” (p. 5). Similarly, the report points out the crucial fact that as much as the need for victim’s role is necessary in “promotion of truth, justice, reparation and guarantees of non-recurrence”, it is equally, if not more imperative, that the “security risks for victims, social risks, economic costs and risks of retraumatization, among others” is adequately conveyed and measures to address those are taken along every step of the process (p. 8). The concerns raised by the UN Human Rights Office of the High Commissioner have been constantly reiterated even before the formation of the two TJ commissions. Yet there has not been a satisfactory progress towards closing the gaps that exist within the TJ process.

In order to address these existing gaps within the TJ process, there is a need for the ideals of RJ to be integrated into the TJ mechanisms in Nepal, mainly moving beyond punishing the perpetrator-based model to a victim-centric process. It is imperative to get comprehensive answers to the questions of “who has been hurt”, “what are their needs”, and “whose obligation is to fulfill those needs?”(Zehr & Mika, 1998, p. 51). Starting from these questions creates a model that provides full ‘support’ to the victim/survivor, and also gives them the chance to work out what they require to move on or get closure or even to ponder first steps needed to start healing. Given the occurrence of fluidity between an individual being both victim and perpetrator the initial categorization itself should not be based on “innocence” or “harm done” as the dichotomy, but the idea of individual’s “notion of suffering”(Selim, 2017, p. 293). Also, among the four strands of

RJ envisioned by Robinson and Hudson, in the case of Nepal the Insurgent strand needs to be utilized even though it might not get immediate results. However, combining Zehr's approach to the current TJ mechanism would provide a more responsive and efficient responses in the short term. On the other hand, Robinson and Hudson's (2016) approach that includes multiple facets to eventually move towards social transformation, or a transformative approach to transitional justice, is important to provide continuous support even when the mechanisms of TJ have run its course. Using these models also helps in understanding the reason behind the conflict or a particular incident. The best way to not repeat the past is to understand it, and RJ provides much needed support to TJ. Hybridity can bring together differing individuals or groups together to collaborate in moving forward while retaining the integrity of the survivor while providing an opportunity for the offender to make amends.

In order to meet both short- and long-term needs, the method of Participatory Action Research (PAR), or similar Participatory Methodologies, can be a useful tool in conjunction with any organization or the community itself to come up with the process they see fit to get the results they need.

PARTICIPATORY ACTION RESEARCH (PAR) / PARTICIPATORY METHODOLOGY TO STRENGTHEN RESTORATIVE JUSTICE (RJ) PRINCIPLES

Robins and Wilson (2015) explore the benefits of Participatory Action Research (PAR) in contrast to traditional quantitative and qualitative/ethnographic research, in studying transitional justice issues.⁵¹ The authors claim the need to change the

⁵¹ PAR extends not only to academic research but should also be applied in terms of NGOs using this method to work with/alongside the groups and population they are trying to support.

“transitional justice research paradigm” to provide victims appropriate support to not only voice their opinions and concerns for the outcome they would like to see, but also have the say in the processes leading to the desired outcomes; Robins and Wilson outline victims’ “participation, accountability, inclusion, empowerment and linkages to the human rights framework” (p. 221) through PAR as a means of providing agency to the victims to create autonomous research and recommendations to address their plights, thus changing the norm from “passive participation to active research” (p. 224). The authors point out the change in participation as the key aspect of the necessary change required in transitional justice research. The current “legalistic” approach to transitional justice, spurred by quantitative and qualitative/ethnographic research, focuses on “civil and political rights” while undermining the violations of “social, cultural, and economic rights” of the involved victims (p. 224). The focus of reparation and restoration, in the current trend, rests on the values ascribed by western ideologies and focuses on restoring institutional capacity rather than following in line with needs of victim groups, thus denying the victims adequate agency and power in influencing the process and subsequently outcomes of transitional justice mechanisms.

Robins and Wilson (2015) provide methods of collaborating with a victims’ group of enforced disappearance in Nepal (NEFAD) in detailing the process of conducting PAR to further the group’s cause. Unlike traditional research, PAR forces researchers to forego “neutrality” and instead asks them to actively work alongside the “human subjects” in furthering their causes and providing them resources to continue with the group’s mission even after the end of the research period. Also, there must be greater fluidity in ascertaining the research question and goals as per the needs of the victims throughout

the process; similarly, “PAR must privilege *process* over the research output itself, allowing engaged communities to use whatever research methods resonate with their social goals” (Robins & Wilson, 2015, p. 231). While they make it abundantly clear that the need for the victims and the researchers to collaborate throughout the research process in equal footing is essential, “participation should not be fetishized” (p. 229). PAR allows victims to discern power relations and create transformative opportunities both for the victims themselves and for the overarching process. Successful completion of PAR provides an invaluable resource in capacity-building for the victim’s association, while also creating knowledge in the field of transitional justice with the active participation of the same people affected by it. Robins & Wilson (2015) touch upon limitations and challenges to conducting PAR, mostly in terms of funding opportunities, security concerns, and ethical issues. Nonetheless, the authors are certain that the role of PAR in providing victims self-determination in addressing their dynamic needs while creating knowledge should be the preferred means of research in dealing with transitional justice issues.

Using a participatory methodology and working through a partnership with the Associations of Families of the Missing in several districts of Nepal, Simon Robins (2009) provides one of the earliest victim-centric and victim-led needs analysis, where the families “participated in the conceptualization, design and implementation of the research” (p. 10). The resulting needs differed along family circumstances, education and economic necessities, and there was no single answer. However, 80 percent of the respondents were still “ambiguous” on the whereabouts of their loved ones, so the implicit need to know what happened, and get closure, has been a pressing need since the

moment the atrocities were committed. In addition, half of the victims of the Maoists alluded that they would join a political movement, whereas only 15% of the victims of the state responded that they were willing to take up arms again if needed. This number surely has grown, on both sides, since the study was conducted a decade ago with the current outcomes and process still not being in favor of the victims. To summarize the most pressing needs of the victims, 64% of respondents wanted economic support and 62% prioritized prosecution. However, the percentage varied considerably in terms of geography based on resources. In urban Kathmandu, 69% of the families asked for prosecution whereas in Bardiya, a majority Tharu community, only 7% of the families prioritized prosecutions. The percentage for economic support was similarly reversed with Kathmandu victims standing at 38% and Bardiya at 60% (p. 33). This clearly shows that the needs among the victim community differs widely according to the victims' economic and social standing.

Localized use of participatory methodologies is often utilized as a response to victims' needs not being met. Such was the case for the creation of the Ardoyne Commemoration Project (ACP) in Northern Ireland. The ACP took "truth-telling" in the form of publishing a book that contained testimonies from victims' relatives and eyewitnesses to circumvent what the group believed to be a "hierarchy of victim" (Lundy & McGovern, 2008, p. 286). Unlike the broader goal in the Nepali context, where there is a need for victims to come together across various divides to fight against the larger structural inequality, in the case of ACP, because of the circumstances, it was a "single-identity" work. However, the book took on greater meaning with stories recorded as long as people who wanted to share their experience and memories lived in Ardoyne. In this

manner, from creating and implementing the process to the end of producing an ‘action’ the experience was locally driven, even though there was a criterion on how to describe the ‘local’, as in the case of ACP. The process as necessitated by the victims can differ in its limits and scope, as required. No matter the situational circumstances, the ACP is a good example of how victims can take both the process and outcomes into their own hands and create something tangible as a different approach to truth-telling and memorialization.

Inclusion of RJ and participatory methods will not change the course of TJ processes or mechanisms overnight. It is but an attempt to holistically categorize the needs of the victims and help the victims better advocate for their needs. It also plays a role in mapping out both the process of how their needs can be met, and how victims can be involved in implementation. The TJ process in Nepal, depending on the victim’s needs, has both short-term and long-term goals. However, with the emphasis of prosecutions within TJ, organizations and TJ ‘implementers’ should not have the mindset of simply ticking-off required boxes to achieve *fait accompli*. Nepal has had a long history of issues with implementing ideas and agreements. Even when the desired mechanisms are put in place, there will be a need to ensure that those mechanisms meet their mandate. The end of the TJ mechanisms’ scope - whenever that might be - with reports and results in place will finally spell out the ‘transition’. However, the overarching need for continuing the work of assessing the needs of victims of conflict and structural violence and providing them necessary support, while holding responsible entities accountable, is crucial.

CHAPTER VIII

ASSESSMENT AND CONCLUSIONS

ASSESSMENT

Is Nepal's case unique? In short, no and yes. The issues plaguing the survivors and victims of the civil war are reminiscent of the same issues brought up in the transitional justice processes in Sierra Leone (Park, 2010), Cyprus (Kovras, 2013), Colombia (Pearson, 2017), and South Africa (Abe, 2014). Even though the foreign minister and other government officials of Nepal have reiterated that Nepal does not need help from outsiders, we need to look at established and prevalent norms in dealing with the TJ process in Nepal. The rallying cry among victims and survivors of the civil war has been for inclusivity in the process, accountability of offenders, and appropriate restitution and reconciliation; these demands could be addressed by integrating principles of Restorative Justice (RJ) into the TJ process.

Yvette Selim (2018) in her comprehensive and insightful book on the TJ process in Nepal comes up with four main takeaways from her research in Nepal:

1. TJ is both producer and a product of politics;
2. voices of victims rarely impact the TJ agenda despite various participatory activities;
3. by privileging the civil conflict period and certain human rights violations, TJ neglects other violence, human rights abuses and other forms of deprivations; and
4. there is little scope to make TJ context-specific when TJ experts and brokers generally pursue the dominant TJ paradigm (p. 13)

Although Selim encapsulates the reality of the TJ process in Nepal, I do not agree with her completely. In my research on the same issue, I have not come upon a

longitudinal study on the subject and for that reason, I contend that some of the takeaways can change over time.⁵²

In order to assess and get a better sense of the complexities of addressing the issue of TJ process and mechanism in Nepal, I refer to the Nested Theory model of conflict created by Máire A. Dugan (1996) (see Figure 6). The issue of TJ sits within a complex nest of relational, situational, and structural issues, each influencing the other at various points. If we go back to the phases of TJ envisioned by Teitel (2003), the earliest TJ mechanisms and process did not have a structural connection. It was very precise with a limited mandate, and a victor's justice made it faster as well. It was only towards the end of the second phase that nuances, and complexities started to emerge. That is also when normative models of TJ started to form, and I agree with Selim's (2018) contention that TJ "experts and brokers" do have to go beyond what has already been done. I would add that the process of getting to a TJ mechanism and implementing it could be the same or follow certain principles that could make it a normative model, yet context-specific.

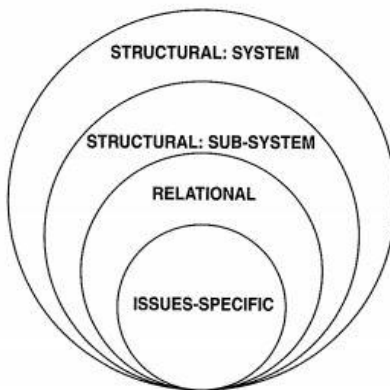


Figure 6: Nested Theory Model of Conflict (Dugan, 1996, p. 14)

⁵² The 125 interviews that were conducted, albeit thorough and covering a wide range of TJ actors, were taken in 2012. It might not seem like many years for academic study, but given the volatile nature of Nepali politics, much has changed since then.

It is not hard to see that the current Nepali government is doing everything in its power to delay or derail the TJ process, primarily to avoid prosecution. However, the notion that victims only want prosecution stems from the TJ “brokers and experts” who have the loudest mouthpiece. It might have started that way, but with so many structural changes occurring within Nepal over the last decade, how the issue fits the model will definitely differ.

My main contention with Selim's (2018) takeaway is two-fold. I agree that giving priority to the civil conflict period can lead to the risk of losing sight of other issues. Hence, in the previous chapter I point out issues occurring before or since the civil war but could have some connection with victims of TJ. Also, it is not only how victims' voices are *shared in a spatial context*, but how their voices are *relayed in terms of language of need* is also an important distinction. Similarly, even if the agenda is not impacted, when the victims feel they are heard and considered, that can still legitimize their needs. As I argued in Chapter Five, the dichotomy of process/output must be bridged in the case of Nepal. There is a desperate need to shift the sole focus of the TJ narrative from outcome to process. It is only when the victims are given ownership, or even allowed to be a part of the process, that the TJ will yield positive results and be legitimized within the eyes of the victims and the international community.

TJ should not be part of the developmental-industrial complex that has plagued Nepal for decades. The TJ process was rushed in the beginning when the mechanisms were formed without proper focus, which I think was the gravest mistake from the outset. My final assessment fall in line with what Gready and Robins (2014) describe as "empowerment beyond the mechanisms of Transitional Justice" (p. 358). They label what

they envision as ‘Transformative Justice’ as “transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived out- comes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level” (p. 340). Whereas TJ is focused more on the issues of the past and at best looks out for the victim’s present interest, the concept of Transformative Justice continues the development of the victim and allows them to be a part of a larger societal structural change.

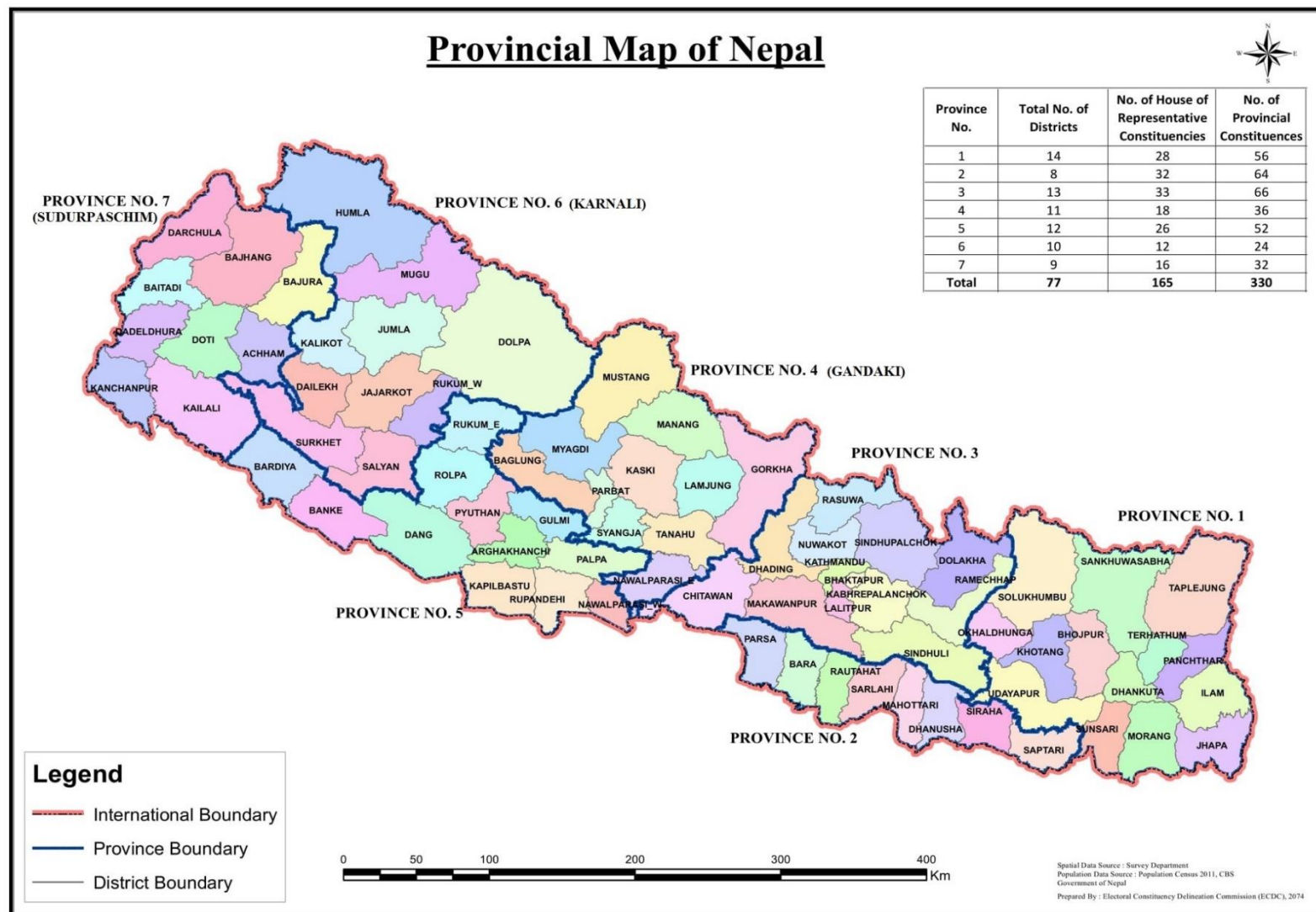
CONCLUSIONS

The Government of Nepal’s response to the needs of victims of the civil war as part of the Transitional Justice mechanism has been dismal, especially in recent years. There has been progress in providing victims with monetary compensation and some state support, but those results have not fully addressed the needs of a majority of the victims. Needs within the victim community are diverse depending on the crimes that were committed, as well the socio-economic status of the victims. However, the overarching need of *inclusion* of the victims in the process of determining, creating, and eventually implementing TJ mechanisms has largely been unmet. The complete dismissal of victims’ role in formulating the TJ process and the subsequent attempt to derail the TRC and CIEDP from carrying out their responsibilities has brought into question the future of the entire TJ mechanism. I am championing a currently missing victim-centric approach to TJ.

The issue of prioritizing legal advocacy by various human rights organizations in Nepal, with or without confirming the actual needs of the victims, has also been one of

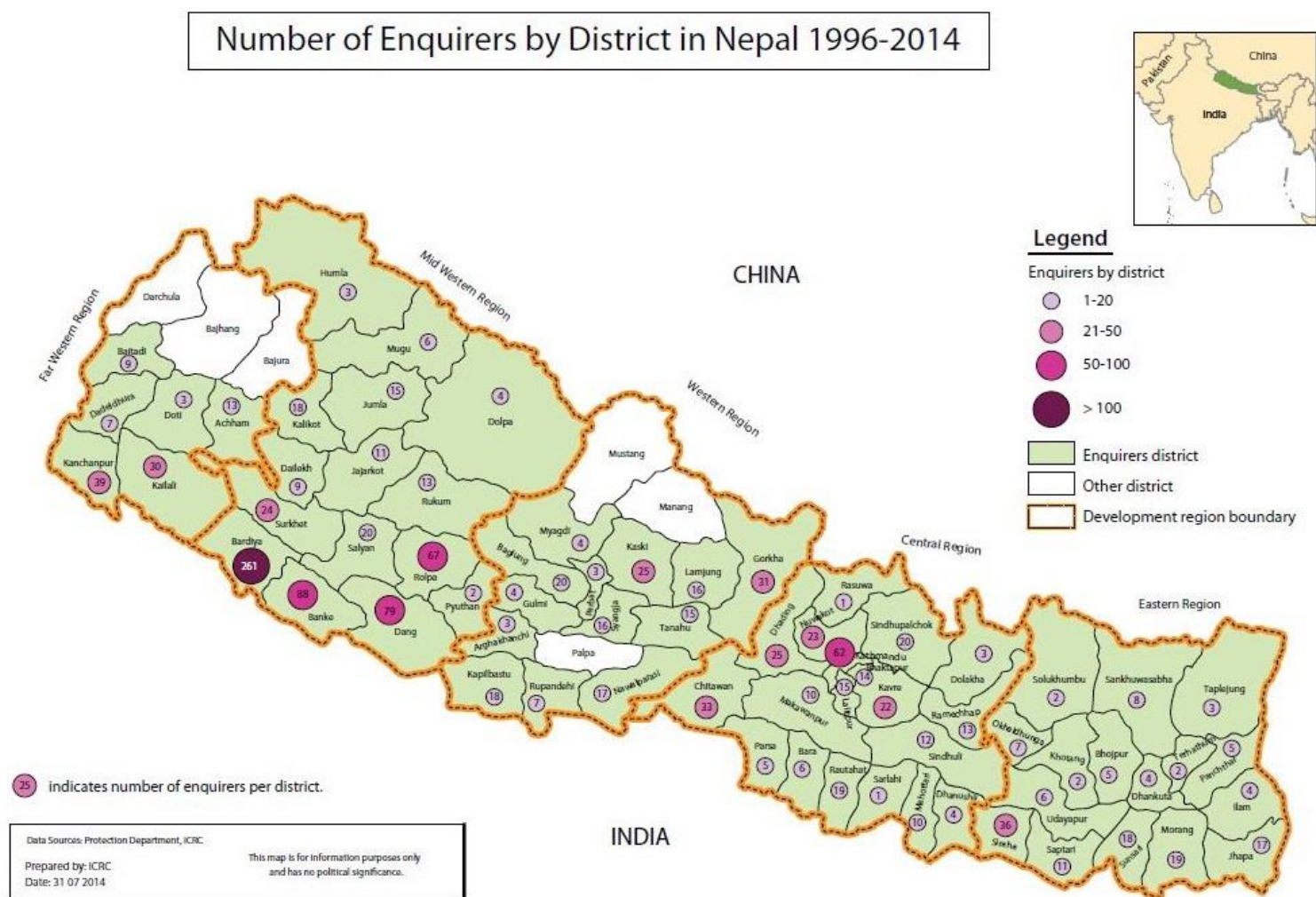
the issues leading to the further politicization of the process of TJ. The rule of law in Nepal is not adequate and can easily bend towards the will of the political and economic elites; issues of impunity cut across all aspects of Nepali lives, and there is not enough political will to mitigate these. In such circumstances there is a role for organizations like Advocacy Form and ICTJ to keep the government in check regarding laws that would not only impede upon human rights but would be an impediment to addressing TJ issues. The role of these organizations goes beyond the temporality of TJ institutions, and are necessary for long-term social change. On the other hand, the inclusion of human rights organizations seems to have, in a sad irony, made the TJ process less victim-centric. I highly recommend that advocacy and victims' organizations use the principles of Restorative Justice (RJ) and Participatory Methodologies to not only determine the actual needs of victims moving forward, but to use the reach and power of the organizations to bring those needs out in the open, instead of just focusing on prosecution. From what the victims themselves have been repeating, prosecution is not the only option, and we need to heed their words. The scope of 'justice' must be realized in accordance with the victims' needs. We should also be wary of heavy "reliance on international NGOs to design, set up and implement difficult TJ projects [,which] may lead to dependency on TJ advocates at the expense of the growth and maturing of local TJ capacities" (Subotić, 2012, p. 125). There is a desperate need to expand the scope of addressing the trauma faced by the victims by focusing on who has been affected and how to help them move forward, rather than focusing on who was guilty and how to punish them.

APPENDIX A: PROVINCIAL MAP OF NEPAL ⁵³



⁵³ Source: (Nepal Election Commission, 2019)

APPENDIX B: NUMBER OF ENQUIRIES BY THE FAMILIES OF THE DISAPPEARED⁵⁴



⁵⁴ Source: (ICRC, 2014, p. 51)

APPENDIX C: CONFLICT VICTIMS' CHARTER BY CONFLICT VICTIMS' COMMON PLATFORM (CVCP)⁵⁵

Charter of Conflict Victims
(*Dwanda Piditko Badapatra*)

Adopted by the National Conference of Conflict Victims on Transitional Justice
20 – 21 November 2018, Kamaladi, Kathmandu

Preamble

We, the conflict victims affiliated with the Conflict Victims' Common Platform (CVCP),

Internalising the principle enunciated in Article 5.2.5 of the Comprehensive Peace Agreement (CPA) signed between the Government of Nepal and the then Maoist rebels on 21 November 2006 – “Both sides agree to set up a high-level Truth and Reconciliation Commission through mutual agreement in order to investigate truth about persons engaged in serious human rights violations and involved in crimes against humanity, and to create an environment of reconciliation in society.”;

Contemplating the human rights principles and the fundamental rights guaranteed by the Constitution of Nepal (2015), promulgated to usher lasting peace and institutionalise the democratic republic and federalism through ending the political transition, following the peaceful settlement of the decade-long armed conflict;

Following the spirit of the verdicts and judicial principles enunciated by the Supreme Court of Nepal on transitional justice in difference instances;

Respecting the Universal Declaration of Human Rights and the various international treaties, conventions and covenants on human rights Nepal is signatory to;

Reviewing the agreements and understandings reached between the Government of Nepal, the political parties and organisations of conflict victims on various occasions;

Recalling the unique Nepali experience regarding the management of Maoist „arms and armies“;

Recognising the need to review the ongoing transitional justice process and make it victim centric and human rights-friendly, to bring Nepal’s transitional justice process to a meaningful conclusion through adherence to the basic principles of transitional justice such as truth-seeking, justice, reparation and institutional reforms to ensure non-repetition of human rights violations, based on the unique societal norms of Nepali society, and by adopting measures of reconciliation to ensure that conflicts do not recur in future;

Hereby unveil this CHARTER OF CONFLICT VICTIMS with the objective of assisting in the conclusion of Nepal’s transitional justice process in a manner that respects the dignity of the conflict victims and recognises their valuable contribution in ushering of social and political change.

⁵⁵ Source: (Conflict Victims Common Platform (CVCP), 2018, pp. 3–8)

1. In order to create a foundation of trust, the State, the then insurgents and the top leadership of the major political parties must through public acknowledgement express remorse and tender apologies for the human rights violations committed during the decade-long armed conflict.
2. Given that it is the absence of political will and underlying commitment that has failed to move the transitional justice process forward even after 12 years of inception of the peace process, the Head of Government and top leadership of the major political parties including the ruling Nepal Communist Party (NCP) and the main opposition Nepali Congress must publicly express their commitment to bring the transitional justice process to a meaningful conclusion in line with the Constitution of Nepal (2015), the Comprehensive Peace Accord (2006), and the sentiment of conflict victims, taking credible and concrete initiatives without delay.
3. Since conflict victims are the primary stakeholders of the transitional justice process, their meaningful participation in both the overall process and related mechanism(s) is mandatory. The Government of Nepal and the major political parties must therefore ensure obligatory involvement of conflict victims in the entire process of transitional justice hereafter.
4. The participation of major stakeholders – the conflict victims, the State, the then insurgents and the major political parties – is mandatory in the transitional justice process. The National Human Rights Commission and civil society including human rights organisations should be consulted in the process. In this context, let it be clear that the conflict victims will not support decisions and processes designed according to the interests and convenience of the State, the then insurgents and the major political parties.
5. On the basis of the unique Nepali experience on the peace process, including „the management of arms and armies“, we call for the establishment of a credible high-level mechanism with the involvement of all stakeholders in order to create an environment of openness and trust to proceed with the transitional justice process.
6. Paying due regard to the Constitution of Nepal (2015); Comprehensive Peace Accord (2006); verdicts and mandamus as well as principles enunciated by the Supreme Court on transitional justice; the various international treaties, conventions and covenants on human rights Nepal is signatory to; the agreements and understandings reached between the Government of Nepal, political parties and various organisations of conflict victims; international best practices; and the unique context and values of Nepali society – a document of common consensus on transitional justice must be drafted by the mechanism to be formed with the participation and consent of conflict

victims. The prevailing policies and laws on transitional justice should be amended or rewritten on the basis of this document.

7. Both the Truth and Reconciliation Commission Act (2014) nor the Commission for Investigation on Enforced Disappeared Persons Act (2014) were adopted without any discussion with conflict victims. Neither is consonant with the spirit of transitional justice and their adoption was not guided by the objective to render justice to conflict victims by ending impunity. Hence, the conflict victims have rejected the very objective with which the government and major political parties unilaterally started transitional justice process. Since the very beginning, the conflict victims have distrusted the two commissions meant to deliver transitional justice – the Truth and Reconciliation Commission and the Commission of Investigation on Enforced Disappeared Persons – for their not being human rights-friendly and for going against the very spirit of transitional justice. Our distrust has been validated by the non-performance of the two commissions over the past four years, and today we regard the Truth and Reconciliation Commission and the Commission of Investigation on Enforced Disappeared Persons as having no relevance, purpose or utility.

8. In the event that the term of the two commissions is extended under the existing circumstances, the Government and political parties are hereby informed that the entire conflict victims community will seek alternative recourse to justice. The demand is for both entities to be restructured on the basis of laws rewritten or amended with the consent of conflict victims. The commission(s) to be established thereafter must be impartial, independent, empowered and autonomous, with the goal of ending impunity and ensuring lasting peace through a transitional justice process that is transparent, gender-sensitive, inclusive and participatory.

9. Truth-seeking, justice and reparation for victims, prosecution and punishment for perpetrators, institutional reform, end of impunity and reconciliation – these are the core values of transitional justice as well as of the Comprehensive Peace Agreement (2006). The process to be initiated must adopt these core values of transitional justice. Any process or legislation that for the sake of expediency prioritises amnesty for perpetrators and undermines the principle of punishment for the offender and justice for the victim in the name of political consensus, transitional justice, reparation and reconciliation will be unacceptable to the victims of conflict.

10. It is the inherent right of conflict victims to know the truth behind the grave human rights violations perpetuated by both the State and rebel sides during conflict, and it is the responsibility of the State to make the truth public through a credible mechanism and transparent process. Hence, the truth needs to be established in a transparent manner through investigation by an entity that is trusted by the conflict victims. Establishment of truth through rigorous investigation lies at the very foundation of a genuine transitional justice process.

11. A broadminded National Reparation Policy is required to promote self-respect and selfreliance among conflict victims, incorporating their sentiments and including measures in education, health, reservation in employment and social security. Such a policy must incorporate United Nations guidelines on reparation, the Supreme Court judgments on reparation, and it must be adopted with the concurrence of conflict victims.

12. The conflict victims are agreed that social reconciliation is an inseparable part of the transitional justice process, while insisting that reconciliation must happen only with the independent and informed consent of the victims. Amnesty and reconciliation are not acceptable in the case of serious violation of human rights.

13. The Federal Government must, in cooperation with provincial and local governments, promote remembrance, archiving and memorialisation of victims of conflict through a national campaign, ensuring due recognition of the identity, dignity and standing of individual victims.

14. In the case of victims of rape, torture and sexual violence, immediate interim legal, medical and compensatory support should be provided upon preliminary investigation. Because truth-seeking in such cases of grave human rights violations tends to be complex, sensitive and related to the dignity of persons, it is essential to protect the social persona of victims during investigations through gender-friendly process and policies, language and terminology. The reparation and compensation process should include legal aid and psycho-social counseling. It is fundamental that victims of grave human rights violations of this category receive justice and that the perpetrators are punished.

15. Article 5.2.3 of the CPA states: “Both sides agree to make public within 60 days of signing of the Agreement information about the real name, surname and address of the persons 'disappeared' or killed during war and to inform the families accordingly.” This provision of the Agreement is yet to be implemented, and conflict victims demand implementation and also that the status of disappeared persons be made public immediately. Given that there have been hindrances in transferring property from the name of disappeared persons to that of the inheritors, causing great financial, familial and mental distress, the Government of Nepal is urged to immediately take interim measures for the transfer of property from the name of a disappeared persons to the rightful heirs.

16. Article 5.1.8 of the CPA provides: “Both sides express an understanding to create a record of government, public and private buildings, land and other properties that have been taken over, locked or otherwise sealed and to return them immediately.” The conflict victims call upon the Government of Nepal, the then insurgents and security agencies to immediately coordinate with provincial and local governments to restore

properties that are yet to be returned, by implementing the various decisions of Government of Nepal on the matter as well as decisions of the Supreme Court. The conflict era loss of property through arson or blasts should be evaluated and the owners compensated.

17. The personnel from security agencies, civil services, teachers and other public employees victimised by the armed conflict and their families should be brought into the stream of transitional justice, including justice and reparations.

18. The Government of Nepal must take full responsibility for children who lost their guardians during the armed conflict, and ensure access to higher education as well as psychosocial counseling for children victimised or otherwise affected by the conflict.

19. The Government of Nepal must provide medical treatment to those who were disabled or injured during the armed conflict, ensuring their livelihood through allowances.

20. The Government of Nepal is urged to ensure that heretofore undocumented conflict victims are documented and that they receive immediate interim assistance.

21. It is important to guarantee the security and confidentiality of the records and evidence pertaining to transitional justice being stored/documentated by the Government of Nepal, the National Human Rights Commission as well as other agencies and organisations.

22. The Government of Nepal is urged to address through special programmes the problems and concerns of combatants of the then rebel force who were discharged by the United Nations Mission to Nepal (UNMIN) during verification citing underage, outside recruitment standards, or late recruitment.

23. The conflict victims express their gratitude for the cooperation extended by civil society including human rights organisations, mass media, as well as the international community on transitional justice and earnestly seek their continued support in the days to come, in line with the roadmap offered by this Charter.

Wednesday, 21 November 2018
Kamaladi, Kathmandu

APPENDIX D: TIMELINE OF TJ AND RELEVANT POLITICAL DEVELOPMENTS

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| 1991 – Maoist party declares “People’s War” |
| 1996 February 13 – Beginning of violent Maoist insurgency |
| 1994 – Mallik Report (Nepalese Truth Commission 1990-1991) |
| 2001 June – Royal Massacre |
| 2001 – King Gyanendra allowed the deployment of army to stifle the Maoist insurgency |
| 2002 – Highest point of conflict with more than 4500 battle deaths in one year alone |
| 2005 February – King Gyanendra assumes full power; state of emergency declared; full army mobilization |
| 2005 November 22 – 12-Point understanding facilitated by the Indian government led to ceasefire and end of violence conflict |
| 2006 April – Jana Andolan II (Second People’s Movement against the king) |
| 2006 November 21 –Comprehensive Peace Accord (CPA) |
| 2006 – Rayamajhi Commission Report |
| 2007 January – Madhesh Andolan (uprising); 30 people killed mostly clashes between Maoist cadres and activists of the Madhesi People’s Rights Forum (MPRF) |
| 2008 February – Eight-Point Agreement |
| 2008 – Interim Relief Program (IRP) |
| 2008 – Attempt to establish two commissions on TJ through ordinances highly criticized and failed |
| 2008 April 10- 1st CA election (CPN-M majority) |
| 2011 January – Withdrawal of UNMIN |
| 2012 – 1500 Maoists combatants integrated into the army while others got retirement packages |
| 2012 May 28 - 1st CA dissolved due to failure to promulgate constitution despite four extensions |
| 2012 June – Mohan Vaidya split from UCPN (M) to form CPN-M |
| 2013 March – Promulgation of Ordinance to Investigate Disappeared Persons, Truth and Reconciliation Commission was quickly given a stay order by the Supreme Court for not meeting international standards |
| 2013 November 19 – 2 nd CA election (NC largest, followed by CPN-UML) - Didn’t meet the January 2015 deadline to promulgate constitution |
| 2014 January 2 – Supreme Court (SC) rules ordinance unconstitutional |
| 2014 June – 234 victims file writ challenging act |
| 2015 February – TRC and CIEDP commissions begin / SC annuls amnesty provision |

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|--|
| 2015 April - government led by Sushil Koirala filed a review petition ⁵⁶ |
| 2015 April – Nepal Earthquake |
| 2015 June – 16-point agreement between NC, CPN (UML), UCPN (M), and MPRF |
| 2015 September 20 – New Constitution of Nepal promulgated with two-thirds majority |
| 2016 March – Nepal states it is not ready to ratify the 29 recommendations on human rights made during 23rd Universal Periodic Review in Geneva made by OHCHR. |
| 2017 February – Initial 2-year mandate of TRC and CIEDP commissions expire |
| 2017 April 16 – District Court of Kavre convicted three former Army officers who were accused of Maina Sunuwar’s murder ⁵⁷ . |
| 2017 April 20 – Six Madhesh parties merge to form Rastriya Janata Party Nepal (RJPN) ⁵⁸ |
| 2017 June 6 – Sher Bahadur Deuba becomes PM for the fourth time – 25 PMs in 27 years. |
| <p>2017 November 26, December 7 - Federal, provincial, local level election.</p> <ul style="list-style-type: none"> ○ House of reps – 275 (165 FPTP and 110 PR) ○ National Assembly – 59 (56 electoral college, 3 Presidential appointment) <ul style="list-style-type: none"> ▪ Communist Party of Nepal (Unified Maoist-Leninist) ▪ Communist Party of Nepal (Maoist Centre) ▪ Nepali Congress party ▪ Rastriya Prajatantra Party ▪ Nepal Sadbhawana Party ▪ Rastriya Janata Party-Nepal ▪ Sanghiya Samajbadi Forum (The Federal Socialist Forum) ▪ Naya Shakti Party (New Force Party) |
| 2018 February – Khadga Prasad Oli (CPN-UML) sworn in as PM |
| 2018 May 17 - ruling Communist Party of Nepal (United Marxist Leninist) (CPN-UML) and Communist Party of Nepal (Maoist Centre) announce their unification as Nepal Communist Party - CPN-UML-led government have two-thirds majority in the parliament. |
| 2018 September - Cash crunch cripples CIEDP, TRC functioning |

⁵⁶ 2019, June 07. SC has deferred the ruling 22 times so far, keeping the victims in a limbo

⁵⁷ Sunuwar was 15 years old when she was allegedly kidnapped, tortured, raped and killed in 2004. The District Court convicted Babi Khatri, Amit Pun and Sunil Adhikari; they have been sentenced to 20 years’ imprisonment. The serving Captain, Nirajan Basnet, was acquitted

⁵⁸ Due to the fact that parliament’s recent decision that only those political parties that get at least 3% of votes in future elections will be called ‘national parties’ for perks and recognition.

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| 2019 February - House endorses amendment bill on Transitional Justice Act: Two transitional justice bodies will get one-year extension and new officials, |
| 2019 April 14 – UN letter sternly recommends pushing forward with TJ mechanisms in a fruitful and inclusive manner |
| 2019 August 30 – International Day of the Disappeared |

APPENDIX E: LIST OF ACRONYMS

ACP - Ardoyne Commemoration Project
CIAA - Commission for Investigation of Abuse of Authority
CIEDP - Commission of Investigation on Enforced Disappeared Persons
CPA - Comprehensive Peace Accord
CPN-M - Communist Party of Nepal (Maoists)
CPN-UML - Communist Party of Nepal (United Marxist Leninist)
CVC - Conflict Victim's Committee
CVCP - Conflict Victims Common Platform
CVNAJ - Conflict Victims' National Alliance for Justice
ICTJ - International Center for Transitional Justice
INSEC - Informal Sector Service Center
MPRF - Madhesi People's Rights Forum
NHRC - National Human Rights Commission
NEFAD - National Network of the Families of the Disappeared and Missing
OHCHR - Office of the High Commissioner for Human Rights
PAR - Participatory Action Research
PM - Prime Minister
RJ - Restorative Justice
SPA - Seven-Party Alliance
TJ - Transitional Justice
TRC - Truth and Reconciliation Commission
UPF - United People's Front
UN - United Nations

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